IN THE

Supreme Court of the United States,

OCTOBER TERM, 1898.

THE DE LA VERGNE REFRIGERATING MACHINE COMPANY,
Petitioner and Plaintiff in Error,
vs.
GERMAN SAVINGS INSTITUTION, ET AL.,
Defendants in Error.
No. 240.

BRIEF FOR DEFENDANTS IN ERROR.

Statement of Case.

This cause is a consolidation of eight causes under an order of the Circuit Court for the Eastern District of Missouri, made February 2, 1897. (Printed transcript, page 27.)

The plaintiffs were the owners of all of the issued stock of the Consolidated Ice Machine Company, an Illinois corporation, on the 16th day of April, 1891, and the defendants were the De La Vergne Refrigerating Machine Company, a New York cor-

poration, and John C. De La Vergne, its president and principal stockholder.

Pending the proceedings said John C. De La Vergne died, and William C. Richardson, the Public Administrator of the City of St. Louis, having taken charge of his Missouri estate, was substituted a party defendant in his place.

This cause has been before the United States Circuit Court of Appeals for the Eighth Circuit twice, and will be found reported in the 36 U. S. App., 184; 17 C. C. A., 34 (also 70 F. R., 146); and in the 28 U. S. App., 681 (also 84 F. R., 1016). When before that court on the last occasion a judgment for $126,849.96 in favor of the plaintiffs and against the De La Vergne Refrigerating Machine Company, and against the assets of said deceased De La Vergne, in the hands of Richardson, Public Administrator, was affirmed, but by a divided court; the court being agreed on all propositions but one. The one on which the court divided was the question of whether the contract out of which the rights of action arose was *ultra vires* the De La Vergne Company. Thereupon said De La Vergne Company presented its petition in this court for a writ of *certiorari* to bring the record here, and such writ was granted by this court.

The facts underlying the controversy are, stated as briefly as is possible, the following:

The Consolidated Ice Machine Company (which for the sake of brevity will be hereafter referred to as the Consolidated Co.), was a corporation organized under the laws of Illinois for the purpose of

manufacturing and selling refrigerating and ice making machines. The entire amount of issued stock of said corporation was one hundred thousand dollars, held in various proportions by the plaintiffs to this consolidated cause. On October 14, 1890, the company made an assignment, under the general assignment laws of Illinois, to one R. E. Jenkins, for the benefit of its creditors. Its assets consisted in the main of a plant for the manufacture of refrigerating and ice making machines, located at Chicago, of patent rights, outstanding accounts, and the goodwill of its business, which the record shows was a large and extensive one. As will be presently shown by a more detailed reference to the record, the company was not insolvent, but had assumed contracts to such an extent that, with its comparatively limited capital, it was unable to carry them out. Its assets exceeded in value its liabilities, both in the opinion of its stockholders and in the opinion of the De La Vergne Refrigerating Machine Company (which will be hereafter referred to merely as the De La Vergne Co.), and by Mr. De La Vergne, as the court below specifically found. In fact, the records shows (Printed transcript, pp. 322-323, and 369-370, 407), that before entering into the contract which gave rise to this litigation the De La Vergne Co. and Mr. De La Vergne employed experts at considerable expense to visit Chicago and St. Louis and to make a careful investigation and examination of the assets of the Consolidated Co. and of their value; and it was not until favorable reports of these experts had been received, and after Mr. De La

Vergne had himself made extensive investigations, that the contract in question was entered into.

Under the assignment laws of Illinois the assignor is entitled to a discontinuance of the assignment proceedings, and to a re-conveyance and re-delivery of the assigned assets, either upon the satisfaction of his obligations or upon the request of a majority in number and amount of his creditors.

The stockholders of the Consolidated Co., satisfied that the assets of their company were sufficient in value to discharge all of their company's debts, and to leave a surplus for distribution amongst themselves, began negotiations through one of their number, Leo Rassieur, one of the plaintiffs, with several concerns in the business of manufacturing refrigerating and similar machinery, with a view to selling their equity therein. Among others, the De La Vergne Co., engaged in that same business in New York, became desirous of acquiring such interest in the Consolidated Company's assets, good will and trade. Correspondence began between Mr. De La Vergne and Mr. Rassieur, and between Mr. De La Vergne and Mr. Jenkins, the assignee, which extended over a period of several months; at the same time the experts above referred to were started on their work and Mr. De La Vergne began examinations himself. The accounts of the experts for outlays and personal services, the one at fifty and the other at twenty-five dollars per day, plus expenses, were paid by the De La Vergne Co.

The De La Vergne Co. and Mr. De La Vergne having satisfied themselves that the assets and good

will of the Consolidated Co. were worth at least $100,000.00 over and above the amount of the obligations of said Consolidated Co., and being anxious to secure an immediate transfer thereof, on the 16th of April, 1891, entered into an agreement in writing with the plaintiffs, as the owners of all of the issued stock of the Consolidated Company, and with said company, whereby the said Consolidated Co. and its said stockholders did, by the said writing, bargain, sell and convey unto the said De La Vergne Co. all their right, title and interest in and to all of the assests of the Consolidated Co.; said transfer and conveyance, however, being subject to the payment of the debts and obligations of said Consolidated Co., and the custody thereof in the assignee, Jenkins. In other words, the De La Vergne Co. understood that in the purchase of these assets it could only secure possession thereof by paying the Consolidated Co.'s indebtedness, or, what might be more profitable, and what the record shows it attempted, by purchasing the claims of creditors at a discount, or by compromising with the creditors, until it thus secured a majority in number and amount of the indebtedness.

As a part of the agreement the several stockholders of the Consolidated Co. agreed that for a period of ten years they would not enter into the business of manufacturing or selling refrigerating or ice making machines, and "for the purpose of placing the De La Vergne Refrigerating Machine Co. in complete control of the assets of the Consolidated Ice Machine Co., *and subject to the legal rights of said assignee, and the creditors of said party of the first part,*" (the Consolidated Company), the stockholders of

the Consolidated Co. agreed that within ten days after the date of said contract and conveyance, which was the 16th day of April, 1891, they would deliver to John C. De La Vergne, for the benefit of the De La Vergne Co., all of the stock which had been issued by the Consolidated Co.

In return for this conveyance of the assets, subject to the legal rights of the creditors, and the covenant of the various plaintiffs to this cause, to refrain from re-entering, directly or indirectly, into the refrigerating machine business for a period of ten years, the said De La Vergne and the said De La Vergne Co., on their part, agreed that within sixty days after the delivery of said shares of stock they would either deliver to the plaintiffs one hundred thousand dollars worth of stock of the De La Vergne Co., guaranteed by the contract to be worth that amount, or, at their option, would pay to said parties the sum of one hundred thousand dollars in cash.

It may be here remarked that no reconveyance has ever been made by said De La Vergne or his company to the plaintiffs or to their company, of said assets; nor have they or any of them ever been released from their said covenant, nor has any of the said stock which was duly delivered in accordance with the contract, assigned either to said De La Vergne, or assigned in blank, ever been re-conveyed or re-assigned. The contract so entered into, and upon which this cause turns, is as follows:

The Contract.

"This agreement made and entered into this sixteenth (16th) day of April, 1891, by and between

the Consolidated Ice Machine Company, a corporation of the City of Chicago, and State of Illinois, party of the first part, Jacob W. Skinkle, Edward Mallinckrodt, Leo Rassieur, Annie Jungenfeld, Frederick Widman, acting in their own right, P. J. Lingenfelder and Leo Rassieur, as Executors of the estate of Edmund Jungenfeld, deceased, and as trustees of Carl Jungenfeld, a minor, and the German Savings Institution, a banking corporation of the State of Missouri, who are the owners of the issued stock of said, The Consolidated Ice Machine Company, and control the unissued stock thereof by virtue of such ownership, parties of the second part, The De La Vergne Refrigerating Machine Company, a corporation of the City of New York, in the State of New York, party of the third part, and John C. De La Vergne, of the City of New York, aforesaid, party of the fourth part,

Witnesseth: whereas the said party of the first part on the fourteenth (14th) day of October, 1890, made an assignment for the benefit of its creditors to R. E. Jenkins, who is now engaged in winding up its affairs, and whereas further the assets of said party of the first part, in the opinion of the said parties of the second part, exceed in value the liabilities thereof, and consist in part of the good-will of said party of the first part (which good-will has been established by six years of successful manufacture of refrigerating and ice-making machines, together with an expenditure of the earnings from such manufacture), *and whereas the said party of the third part is willing to acquire* **such** *right as the said parties of the first and second parts* **can** *assign*

in and to the said assets, subject to the obligations of the said party of the first part; and whereas further, under the laws of the State of Illinois, under which the assignment aforesaid has been made, the said party of the first part is not entitled to the possession of its assets in the hands of the assignee aforesaid, until its obligations have been complied with and discharged, or the majority in number, and amount of its creditors have signified their willingness to the court having jurisdiction of said assignment, and an order has been obtained therefrom to have the said assets transferred and delivered by said Jenkins to the said party of the first part, or its assigns, and whereas further, the said party of the third part is now incorporated under the laws of the State of New York with a full paid capital stock of only three hundred and fifty thousand (350,000) dollars, divided into three thousand five hundred (3,500) shares of one hundred (100) dollars each, par value and its net assets, in the opinion of the said party of the fourth part are fully worth the sum of one million four hundred thousand (1,400,000) dollars; and whereas the said party of the third part and its stockholders are now considering a plan of so increasing the stock of said company as will enable said company to have a full paid capital of two million (2,000,000) dollars, one million four hundred thousand (1,400,000) dollars of which stock is to be issued to its present stockholders, 100,000 to the stockholders of the Consolidated Ice Machine Company under the terms of this agreement, and the remaining five hundred thousand (500,000) dollars of stock to be disposed of in the market at not less than par, and the

proceeds of such at par to become part and parcel of the assets of said De La Vergne Refrigerating Machine Company, the said party of the third part, such plan of increasing the stock of said party of the third part to be carried out either by an increase of stock, under the laws of the State of New York, or by the organization of a new company, under the laws of the State of New Jersey, or some other State, for the purpose of the purchasing of the assets and good will of the party of the third part.

Now, therefore, in view of the premises, and for and in consideration of the mutual advantages to be gained by the execution of this contract:

First. The said party of the first part and the said parties of the second part, agree and covenant to and with the said parties of the third and fourth parts to bargain, sell and convey, and **by these presents do bargain, sell and convey unto the said party of the third part all their right, title and interest in and to the assets of the said party of the first part,** *subject to the payment of its obligations, and subject to the custody thereof in the legal custodian, R. E. Jenkins, assignee, as aforesaid.*

Second. The said parties of the third and fourth parts covenant and agree to and with the said parties of the first and second parts to issue unto the said parties of the second part full paid stock in the said party of the third part to the amount of one hundred thousand dollars ($100,000.00), and which stock so to be issued shall be issued unto the said parties respectively in the following proportions, to-wit:

To J. W. Skinkle.....50-200
" Edward Mallinckrodt.....45-200
" Leo Rassieur.....40-200
" Annie Jungenfeld.....14-200
" German Savings Institution.....5-200
" Frederick Widman.....14-200
" P. J. Lingenfelder and Leo Rassieur, as executors as aforesaid.....18-200
" P. J. Lingenfelder and Leo Rassieur, as trustees as aforesaid.....14-200

Third. The said parties of the third and fourth parts covenant and agree that the net assets of the said party of the third part are fully worth one million four hundred thousand (1,400,000) dollars, not including the assets and rights purchased under this agreement, and that said stock in the De La Vergne Refrigerating Machine Company to be issued under this agreement to said parties of the second part shall represent not less than one-fifteenth (1-15) part of said assets, and that no additional stock be issued in the said company, or in the new company to be organized as hereinbefore set forth, beyond one million five hundred thousand (1,500,000) dollars par value, without actual value in the full amount being first received by said company, and the said parties of the third and fourth parts covenant and agree to and with the said parties of the second part that said parties of the second part shall have the privilege of examining said assets of the party of the third part until the first day of August, 1891, for the purpose of verifying the statement made herein concerning the value of said as-

sets, and that if it be ascertained that the actual value of said assets is not in accordance with the covenant hereinbefore set forth, then the said parties of the second part shall have the privilege and right of demanding that said stock so to be issued to them be made to accord with the covenant aforesaid, regarding value, and the said parties of the third and fourth parts covenant and agree to make said stock represent the value aforesaid; and it is further covenanted by and between the parties, that any examination made in good faith by the purchasers of at least one hundred thousand dollars ($100,000.00) additional stock in said party of the third part, or in the new company to be organized for the purpose of acquiring the assets of said party of the third part shall be conclusive evidence upon the parties hereto as regards the net value of said assets, providing an opportunity be given to said parties of the second part of being represented and taking part in the making of any such examination.

Fourth. For the purpose of placing the said party of the third part in complete control of the assets of the party of the first part, *subject to the legal rights of said assignee, and the creditors of said party of the first part*, the said parties of the second part agree within ten (10) days from the date hereof to assign to said party of the fourth part, for the benefit of the said party of the third part, all the stock of the said party of the first part, which has been issued and which they guarantee has been paid in full, and within sixty (60) days thereafter the said parties of the third part and fourth parts agree to issue and de-

liver to said parties of the second part in the proportions aforementioned the stock of the said party of the third part to the amount of one hundred thousand (100,000) dollars.

Fifth. The said parties of the second part covenant and agree to and with said parties of the third and fourth parts to accept in lieu of the said stock in the said party of the third part, or of any successor to the said party of the third part, the sum of one hundred thousand (100,000) dollars in cash, at the option of said party of the fourth part.

Sixth. It is clearly understood by all the parties hereto that the said party of the third part by the acceptance of the above conveyance, does not make itself liable for any of the obligations and liabilities of the said party of the first part.

Seventh. The said parties of the second part covenant and agree to and with the said parties of the third and fourth parts for a period of ten (10) years from the date hereof not to enter into or become connected with the sale of refrigerating or ice-making machines, directly or indirectly, within the United States of North America, excepting the State of Montana, and excepting also the business of the said party of the third part, or of such company as becomes its successor and purchaser of all its rights.

In witness whereof the said parties of the second and fourth parts have hereunto set their hands and seals, and the said parties of the first and third parts have caused their respective presidents to affix

their names on the day and date first hereinbefore written.

(Signed) THE CONSOLIDATED ICE MACHINE CO.,
by J. W. SKINKLE, Pres. (Seal.)
(Signed) JACOB W. SKINKLE, (Seal.)
(Signed) EDWARD MALLINCKRODT, (Seal.)
(Signed) LEO RASSIEUR, (Seal.)
(Signed) ANNIE JUNGENFELD, (Seal.)
by LEO RASSIEUR, her Att'y in fact.
(Signed) FRED WIDMAN, (Seal.)
by LEO RASSIEUR, his Att'y.
(Signed) P. J. LINGENFELDER, (Seal.)
(Signed) LEO RASSIEUR, (Seal.)
Executors of the estate of Ed. Jungenfeld, deceased.
(Signed) P. J. LINGENFELDER, (Seal.)
(Signed) LEO RASSIEUR, (Seal.)
Trustees of CARL JUNGENFELD, minor.
(Signed) GERMAN SAVINGS INSTITUTION, (Seal.)
by LEO RASSIEUR, its Att'y.
(Signed)
THE DE LA VERGNE REFRIGERATING MACHINE CO.,
by (Seal.)
JOHN C. DE LA VERGNE, Pres.
JOHN C. DE LA VERGNE, (Seal.)

I consent to the execution of above contract and ratify the same.

(Signed) J. KOENIGSBERG.

I consent to the execution of above contract aed ratify the same.

(Signed) ANNA JUNGENFELD,
by H. A. HAEUSSLER, Att'y.

I consent to the execution of above contract and ratify same.

(Signed) F. WIDMAN.

Herewith I ratify the execution of foregoing agreement by my co-executor and co-trustee, and adopt the same as my act as trustee and executor, and consent to such sale and contract.

P. J. LINGENFELDER,
Executor of E. Jungenfeld's Estate.

P. J. LINGENFELDER,
Trustee for Carl Jungenfeld, a minor.

The undersigned, German Savings Institution, herewith ratifies the execution of foregoing agreement and sale by Leo Rassieur, its attorney, and consents to said sale.

GERMAN SAVINGS INSTITUTION,
by RICHARD HOSPES, Cashier."

In accordance with the terms of the foregoing contract Mr. Rassieur forwarded to New York City all of the certificates of the issued stock of the Consolidated Co., assigned on the backs of the certificates, and the same were delivered to Mr. De La Vergne on April 25, 1891, and therefore within the ten days provided for by the contract. (Printed transcript, page 44.)

Two days thereafter, on April 27, 1891, Mr. Ashbell P. Fitch, attorney for Mr. De La Vergne, wrote Mr. Rassieur that Mr. De La Vergne had referred these certificates and the transfers endorsed upon them, to

him for examination, and he called attention to some technical objections, which he said he feared. These matters were thereupon promptly remedied and no further demands were made by De La Vergne or by his company or by his attorney.

In the month of July, 1891, and several times during that month and later, demands were made by Mr. Rassieur, for himself and his associates, upon the defendants, for the one hundred thousand dollars of stock or money. (Transcript, 48.) The result of these repeated demands was a letter from Mr. Fitch, dated September 12, 1891, in which he announced substantially, and for the first time, that defendants would decline to carry out their part of the contract. The grounds assigned for such conduct have been characterized by the United States Court of Appeals as "*frivolous.*" The evidence preserved in the transcript discloses that between the day when the contract was entered into in April, and the date of this letter in September, the De La Vergne Co. had secured the former New York office of the Consolidated Co.; had secretly employed the former Eastern representative of the Consolidated Co., making contracts with former customers of the Consolidated Co. in the name of such representative, furnishing him, however, with the means whereby the same were performed, and taking assignments thereof secretly from him; and had practically secured all of the benefits and advantages of the contract, except the tangible Chicago assets, which it allowed to go to sale by the assignee; at this sale Mr. De La Vergne was present and offered for these

tangible assets alone (open outstanding accounts, &c., were not included) the sum of $25,000.00.

In this situation of affairs, the De La Vergne Co. and De La Vergne declining to afford any compensation to the Consolidated Company's stockholders, suits were instituted on July 2, 1892, by attachment by said various stockholders against defendants, in the Circuit Court of the City of St. Louis. On petition of defendants the causes were removed from the State court to the United States Circuit Court for the Eastern District of Missouri.

When the causes were there reached for trial a jury was waived and they were submitted to the court, PHILLIPS, J. The court found a judgment in favor of the defendants, basing its result in the main upon the ground that certain of the stock of the Consolidated Co. which was vested in trustees for a minor, and in executors of a deceased party, did not pass to the defendants, and that, therefore, the plaintiffs could not recover, although said stock was but a small portion of all the stock embraced in the transaction.

The trial court proceeded on the theory that the subject of the contract and conveyance was not the assets, good will, etc. (the stock being merely the vehicle for placing defendants in more complete control of said assets, in the language of the contract itself,) but that the subject of the sale was *the stock;* and that if any part of it, however small, did not legally pass to the defendants, they were not liable to any of the plaintiffs.

From this judgment the German Savings Institution, one of the plaintiffs, sued out a writ of error and

the cause was taken to the United States Circuit Court of Appeals for the Eighth Circuit, where the judgment of the lower court was reversed, said Court of Appeals finding and declaring that under the contract the things conveyed and dealt with were the assets, good-will, trade, etc., of the Consolidated Co., the certificates of stock being merely the muniment or better evidence of title. The other causes, under stipulation, abided the result in the case of the German Savings Institution.

The case had been submitted in the Circuit Court upon an agreed statement of facts, which, for the convenience of the court, is here set forth in full, as follows:

Agreed Statement of Facts.

"In the above entitled causes it is hereby stipulated and agreed, by and between the several plaintiffs to said several causes, and the several defendants therein, that the said causes shall be taken by the court as submitted upon the pleadings and the following statement of facts:

That the defendant, the De La Vergne Refrigerating Machine Company is, and at all the times covered by the pleadings, was, a corporation organized under the laws of the State of New York, with its chief office in the City of New York, in said State, and the defendant John C. De La Vergne is, and at the time when these suits were brought was, a resident of the City of New York in said State. That on the 14th day of October, 1890, the Consolidated Ice

Machine Company was a corporation organized under the laws of the State of Illinois, and was engaged in the manufacture and sale of refrigerating and ice-making machines. That Exhibit One is the original certificate of papers of its incorporation, and correctly sets forth the subscriptions for stock which were made and reported to the Secretary of State before said certificate of organization was issued. That on said 14th day of October, 1890, said Consolidated Ice Machine Company made a general assignment for the benefit of its creditors to one R. E. Jenkins, and that at the time of said assignment the capital stock of said Consolidated Ice Machine Company consisted of two thousand shares of the par value of one hundred dollars each, of which said two thousand shares, five hundred subscribed and held by W. B. Bushnell had been forfeited to the company for non-payment of assessments; the five hundred subscribed by W. B. Bushnell as treasury stock had been subscribed by him to sell to workmen in the Consolidated Ice Machine Company, but were never sold or paid for, and that no certificate had ever been issued for them by said corporation, and that the remaining one thousand shares at said time were fully paid and appeared on the books of the company, and certificates for them were issued, transferred and held as follows:

(1.) Twenty-five shares represented by certificate No. 17 of said Consolidated Ice Machine Company, issued to Leo Rassieur and P. J. Lingenfelder, executors, and appearing in their names upon the books of the company, which certificate had been endorsed by them and thereupon delivered to

said German Savings Institution as collateral security.

(2.) Leo Rassieur, 200 shares; represented by certificates Nos. 5, 6, 7 and 8, each for fifty shares, issued to said Leo Rassieur, and appearing in his name upon the books.

(3.) Anna, or Annie Jungenfeld, 70 shares; represented by certificate number 12, and appearing in her name upon the books.

(4.) Jacob W. Skinkle, 250 shares; these shares appeared in his name upon the books of the company; the certificate for them he had theretofore delivered as collateral security for an indebtedness which he owed to the Merchants' National Bank, and said bank had delivered said certificate to him with power to make the contract hereinafter referred to in his name, said shares being represented by certificate No. 4.

(5.) Edward Mallinckrodt, 225 shares; represented by certificate No. 16, and appearing in his name on the books.

(6.) Ninety shares appearing on the books of the company in the name of E. Jungenfeld and represented by certificate No. 15; Leo Rassieur and P. J. Lingenfelder were at said time the duly appointed and qualified executors of the estate of E. Jungenfeld, deceased.

(7.) Leo Rassieur and P. J. Lingenfelder, trustees of Carl Jungenfeld, 70 shares; represented by certificate No. 13, and appearing in their names upon the books of the company.

(8.) Frederick Widman, 70 shares; represented by certificate No. 18, and appearing in his name upon the books of the company.

That the assets assigned by said Consolidated Ice Machine Company to said Jenkins consisted in the main of a plant for the manufacture of its machines, located in the City of Chicago, Illinois, of patent rights, outstanding accounts and the good will of its business, in which it had been engaged constantly for about six years. That at said time and for some time prior thereto, the De La Vergne Refrigerating Machine Company was also engaged in the manufacture and sale of refrigerating and ice-making machines, and defendant, John C. De La Vergne, was the principal stockholder and the president thereof.

That on the 16th day of April, 1891, the defendants, De La Vergne and The De La Vergne Refrigerating Machine Company and said Consolidated Ice Machine Company, and said several plaintiffs did enter into a contract in writing, of which the following is a copy:

The Contract.

"This agreement made and entered into this sixteenth (16th) day of April, 1891, by and between the Consolidated Ice Machine Company, a corporation of the City of Chicago, and State of Illinois, party of the first part, Jacob W. Skinkle, Edward Mallinckrodt, Leo Rassieur, Annie Jungenfeld, Frederick Widman, acting in their own right, P. J. Lingenfelder and Leo Rassieur, as Executors of the

estate of Edmund Jungenfeld, deceased, and as trustees of Carl Jungenfeld, a minor, and the German Savings Institution, a banking corporation of the State of Missouri, who are the owners of the issued stock of said, The Consolidated Ice Machine Company, and control the unissued stock thereof by virtue of such ownership, parties of the second part, The De La Vergne Refrigerating Machine Company, a corporation of the City of New York, in the State of New York, party of the third part, and John C. De La Vergne, of the City of New York, aforesaid, party of the fourth part,

Witnesseth: whereas the said party of the first part on the fourteenth (14th) day of October, 1890, made an assignment for the benefit of its creditors to R. E. Jenkins, who is now engaged in winding up its affairs, and whereas further the assets of said party of the first part, in the opinion of the said parties of the second part, exceed in value the liabilities thereof, and consist in part of the good-will of said party of the first part (which good-will has been established by six years of successful manufacture of refrigerating and ice-making machines, together with an expenditure of the earnings from such manufacture), *and whereas the said party of the third part is willing to acquire* **such** *right as the said parties of the first and second parts* **can** *assign in and to the said assets, subject to the obligations of the said party of the first part;* and whereas further, under the laws of the State of Illinois, under which the assignment aforesaid has been made, the said party of the first part is not entitled to the possession of its assets in the hands of the assignee

aforesaid, until its obligations have been complied with and discharged, or the majority in number, and amount of its creditors have signified their willingness to the court having jurisdiction of said assignment, and an order has been obtained therefrom to have the said assets transferred and delivered by said Jenkins to the said party of the first part, or its assigns, and whereas further, the said party of the third part is now incorporated under the laws of the State of New York with a full paid capital stock of only three hundred and fifty thousand (350,000) dollars, divided into three thousand five hundred (3,500) shares of one hundred (100) dollars each, par value, and its net assets, in the opinion of the said party of the fourth part are fully worth the sum of one million four hundred thousand (1,400,000) dollars; and whereas the said party of the third part and its stockholders are now considering a plan of so increasing the stock of said company as will enable said company to have a full paid capital of two million (2,000,000) dollars, one million four hundred thousand (1,400,000) dollars of which stock is to be issued to its present stockholders, 100,000 to the stockholders of the Consolidated Ice Machine Company under the terms of this agreement, and the remaining five hundred thousand (500,000) dollars of stock to be disposed of in the market at not less than par, and the proceeds of such at par to become part and parcel of the assets of said De La Vergne Refrigerating Machine Company, the said party of the third part, such plan of increasing the stock of said party of the third part to be carried out either by an increase of stock, under the laws of the State of New York, or by the

organization of a new company, under the laws of the State of New Jersey, or some other State, for the purpose of the purchasing of the assets and good will of the party of the third part.

Now, therefore, in view of the premises, and for and in consideration of the mutual advantages to be gained by the execution of this contract:

First. The said party of the first part and the said parties of the second part, agree and covenant to and with the said parties of the third and fourth parts to bargain, sell and convey, and **by these presents do bargain, sell and convey unto the said party of the third part all their right, title and interest in and to the assets of the said party of the first part,** *subject to the payment of its obligations, and subject to the custody thereof in the legal custodian, R. E. Jenkins, assignee, as aforesaid.*

Second. The said parties of the third and fourth parts covenant and agree to and with the said parties of the first and second parts to issue unto the said parties of the second part full paid stock in the said party of the third part to the amount of one hundred thousand dollars ($100,000.00), and which stock so to be issued shall be issued unto the said parties respectively in the following proportions, to-wit:

To J. W. Skinkle.....50-200
" Edward Mallinckrodt.....45-200
" Leo Rassieur.....40-200
" Annie Jungenfeld.....14-200
" German Savings Institution..... 5-200
" Frederick Widman.....14-200

" P. J. Lingenfelder and Leo Rassieur, as executors as aforesaid.....18-200
" P. J. Lingenfelder and Leo Rassieur, as trustees as aforesaid.....14-200

Third. The said parties of the third and fourth parts covenant and agree that the net assets of the said party of the third part are fully worth one million four hundred thousand (1,400,000) dollars, not including the assets and rights purchased under this agreement, and that said stock in the De La Vergne Refrigerating Machine Company to be issued under this agreement to said parties of the second part shall represent not less than one-fifteenth (1-15) part of said assets, and that no additional stock be issued in the said company, or in the new company to be organized as hereinbefore set forth, beyond one million five hundred thousand (1,500,000) dollars par value, without actual value in the full amount being first received by said company, and the said parties of the third and fourth parts covenant and agree to and with the said parties of the second part, that said parties of the second part shall have the privilege of examining said assets of the party of the third part until the first day of August, 1891, for the purpose of verifying the statement made herein concerning the value of said assets, and that if it be ascertained that the actual value of said assets is not in accordance with the covenant hereinbefore set forth, then the said parties of the second part shall have the privilege and right of demanding that said stock so to be issued to them be made to accord with the covenant afore-

said, regarding value, and the said parties of the third and fourth parts covenant and agree to make said stock represent the value aforesaid; and it is further covenanted by and between the parties, that any examination made in good faith by the purchasers of at least one hundred thousand dollars ($100,000.00) additional stock in said party of the third part, or in the new company to be organized for the purpose of acquiring the assets of said party of the third part, shall be conclusive evidence upon the parties hereto as regards the net value of said assets, providing an opportunity be given to said parties of the second part of being represented and taking part in the making of any such examination.

Fourth. For the purpose of placing the said party of the third part in complete control of the assets of the party of the first part, *subject to the legal rights of said assignee, and the creditors of said party of the first part*, the said parties of the second part agree within ten (10) days from the date hereof to assign to said party of the fourth part, for the benefit of the said party of the third part, all the stock of the said party of the first part, which has been issued and which they guarantee has been paid in full, and within sixty (60) days thereafter the said parties of the third part and fourth parts agree to issue and deliver to said parties of the second part in the proportions aforementioned the stock of the said party of the third part to the amount of one hundred thousand (100,000) dollars.

Fifth. The said parties of the second part covenant and agree to and with said parties of the third

and fourth parts to accept in lieu of the said stock in the said party of the third part, or of any successor to the said party of the third part, the sum of one hundred thousand (100,000) dollars in cash, at the option of said party of the fourth part.

Sixth. It is clearly understood by all the parties hereto that the said party of the third part by the acceptance of the above conveyance, does not make itself liable for any of the obligations and liabilities of the said party of the first part.

Seventh. The said parties of the second part covenant and agree to and with the said parties of the third and fourth parts for a period of ten (10) years from the date hereof not to enter into or become connected with the sale of refrigerating or ice-making machines, directly or indirectly, within the United States of North America, excepting the State of Montana, and excepting also the business of the said party of the third part, or of such company as becomes its successor and purchaser of all its rights.

In witness whereof, the said parties of the second and fourth parts have hereunto set their hands and seals, and the said parties of the first and third parts have caused their respective presidents to affix their names on the day and date first hereinbefore written.

(Signed) The Consolidated Ice Machine Co.,
by J. W. Skinkle, Pres. (Seal.)
(Signed) Jacob W. Skinkle, (Seal.)
(Signed) Edward Mallinckrodt, (Seal.)
(Signed) Leo Rassieur, (Seal.)

(Signed) ANNIE JUNGENFELD, (Seal.)
by LEO RASSIEUR, her Att'y in fact.
(Signed) FRED WIDMAN, (Seal.)
by LEO RASSIEUR, his Att'y.
(Signed) P. J. LINGENFELDER, (Seal.)
(Signed) LEO RASSIEUR, (Seal.)
Executors of the estate of Ed. Jungenfeld, deceased.
(Signed) P. J. LINGENFELDER, (Seal.)
(Signed) LEO RASSIEUR, (Seal.)
Trustees of CARL JUNGENFELD, minor.
(Signed) GERMAN SAVINGS INSTITUTION, (Seal.)
by LEO RASSIEUR, its Att'y.
(Signed)
THE DE LA VERGNE REFRIGERATING MACHINE CO.,
by (Seal.)
JOHN C. DE LA VERGNE, Pres.
JOHN C. DE LA VERGNE, (Seal.)

I consent to the execution of above contract and ratify the same.

(Signed) J. KOENIGSBERG.

I consent to the execution of above contract aED ratify the same.

(Signed) ANNA JUNGENFELD,
by H. A. HAEUSSLER, Att'y.

I consent to the execution of above contract and ratify same.

(Signed) F. WIDMAN.

Herewith I ratify the execution of foregoing agreement by my co-executor and co-trustee, and adopt

the same as my act as trustee and executor, and consent to such sale and contract.

P. J. LINGENFELDER,
Executor of E. Jungenfeld's Estate.

P. J. LINGENFELDER,
Trustee for Carl Jungenfeld, a minor.

The undersigned, German Savings Institution, herewith ratifies the execution of foregoing agreement and sale by Leo Rassieur, its attorney, and consents to said sale.

GERMAN SAVINGS INSTITUTION,
by RICHARD HOSPES, Cashier."

It is further agreed that subsequently, to-wit, on the 23d day of April, 1891, Leo Rassieur addressed a letter to Joseph Koenigsberg, a copy of which is as follows:

"April 23d, 1891.

MR. JOSEPH KOENIGSBERG,

No. 213 E. 54th street, New York City, N. Y.:

Dear Sir—Enclosed please find certificates of Consolidated I. M. Co., as follows:

No.	17 to Leo Rassieur and P. J. Lingenfelder..	25	shares
"	6 " Leo Rassieur.....	50	"
"	8 " Leo Rassieur.....	50	"
"	7 " Leo Rassieur.....	50	"
"	5 " Leo Rassieur.....	50	"
"	12 " Anna Jungenfeld.....	70	"
"	4 " Jacob W. Skinkle.....	250	"
"	16 " Edward Mallinckrodt.....	225	"
"	15 " E. Jungenfeld Estate.....	90	"
"	13 " L. R. and P. J. L. for Carl Jungenfeld	70	"
"	18 " F. Widman	70	"
		1,000	"

which please hand on Saturday, April 25th, to Mr. De La Vergne in person, this being the last day.

Yours very truly,

LEO RASSIEUR."

That in this letter were enclosed certificates of stock of the Consolidated Ice Machine Company, with certain indorsements thereon, the originals of which are hereto attached and marked Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12.

That the signature to the transfer of certificate No. 4 is that of J. W. Skinkle, plaintiff in case No. 3726; that the signature to transfers of certificates Nos. 5, 6, 7 and 8, is that of Leo Rassieur, plaintiff in case No. 3695; that the signature to transfer of certificate No. 12 is that of Anna Jungenfeld, plaintiff in case No. 3700; that the signatures to transfers of certificate No. 13, 15 and 17, are the handwriting of Leo Rassieur alone; that the signature to the transfer of said certificate No. 16, is that of Edw. Mallinckrodt, plaintiff in case No. 3698;

that the signature to transfer of certificate No. 18, is that of Fred Widman, plaintiff in case No. 3696.

That on the 25th day of April, 1891, said letter from Leo Rassieur to Joseph Koenigsberg of 23d day of April, 1891, together with said enclosures was received by said Koenigsberg; and that on said same 25th day of April, 1891, said Koenigsberg handed all said certificates of stock in the Consolidated Ice Machine Company endorsed as aforesaid, to defendant John C. De La Vergne; and that said John C. De La Vergne thereupon made upon the margin of said letter of the 23d day of April, 1891, the following endorsement:

"4–25, '91.

Received the above described stock from the hand of J. Koenigsberg.

JOHN C. DE LA VERGNE."

That on the 27th day of April, 1891, Ashbell P. Fitch, attorney for defendant John C. De La Vergne, wrote and mailed to Leo Rassieur the following letter:

"April 27th, 1891.

LEO RASSIEUR.

Southwest Corner of Fourth and Market Sts.,

St. Louis, Mo.

Dear Sir:—Mr. De La Vergne has submitted to me the transfer of certificate No. 17 of 25 shares of the Consolidated Ice Machine Company, issued to you and Mr. Lingenfelder as executors of Edmund Jungenfeld's estate, dated September 11th, 1889.

These shares are transferred by the signature of P. J. Lingenfelder and Leo Rassieur, executors of

Ed Jungenfeld, deceased, which of course would be regular. In the body of the assignment, however, are the words 'to John C. De La Vergne by direction of the German Savings Institution, *owner hereof*.'

It seems to me that the statement that the German Savings Institution is owner of the shares of stock is notice to Mr. De La Vergne of their ownership in such form as would bind him. It seems to me further that if the German Savings Institution are the owners of this certificate, and Mr. De La Vergne has been notified thereof, that the signatures of the executors of the Jungenfeld estate is insufficient to transfer the certificate to Mr. De La Vergne, unless he holds some ratification of the transfer by the German Savings Institution.

I suppose there would be no difficulty in our getting some memoranda, signed in the proper form by the Institution, to the effect that they recognize and approve the transfer of this certificate to Mr. De La Vergne.

There are also several other matters to which I would like to call your attention in this connection.

The signature of the holders of the various certificates to the transfer of the same are not witnessed except in two cases: Mr. Skinkle's certificate No. 4, for 250 shares, is witnessed in lead pencil, and the Anna Jungenfeld certificate, No. 12, for 70 shares, is witnessed by Marguerite Von Jungenfeld.

The stock of the Jungenfeld estate is transferred by P. J. Lingenfelder and yourself, as executors, and I assume that the names of both executors were signed by you, probably, under some authority

which does not appear on the face of the paper. This is also the case in regard to certificate No. 13 for 70 shares, held by Mr. Lingenfelder and yourself, as trustees for Carl Lingenfelder (*sic*).

There is also a clause printed on the back of this stock in such a way as to be notice to us, which reads as follows:

The holder of any stock, who desires to sell the same or any part thereof, shall be required to tender such stock to the company, and to the stockholders thereof, at par for a period of sixty days, and shall only have the right to sell the same in open market after the company and its stockholders have declined to purchase the same.

I desire to suggest to you that the different questions raised by the facts which are mentioned above might be covered by some agreement signed by all the stockholders reciting that such a tender had been made to them and to the company, and declined, or that with knowledge of their rights in the premises, the different stockholders had waived this requirement and that this agreement might recite the sale of this stock to Mr. De La Vergne and be signed by Mr. Lingenfelder in his capacity as executor and in his capacity as trustee, and that it might also contain some recital and signature which would cover the question of the witnessing of the different transfers.

These are suggestions as to how this can be covered. Of course you will understand that in one way or other it will be necessary for me to have these points satisfactorily covered. This seems to me to be doubly necessary because it appears on the

face of the papers that there is an estate and trust involving minor children, and some of the stock is in the name of a lady, and you know how necessary it is under such circumstances to be careful to get the papers right while the people are all alive and while the transaction is known to us all.

Yours sincerely,

(Signed) ASHBELL P. FITCH."

Which letter was received by said Leo Rassieur on the 29th day of April, 1891. That on said 29th day of April, 1891, Leo Rassieur replied to said A. P. Fitch in the following letter:

"St. Louis, April 29th, 1891.

A. P. FITCH, ESQ., Atty. at Law.

93 Nassau street, New York City, N. Y.

Dear Sir:—In reply to your favor of the 29th inst. which came to hand to-day, I write to inform you that I shall comply with the request made therein by you.

The fact that all the stockholders have transferred to Mr. De La Vergne under an agreement joined in by the company, seemed to me sufficient to be construed as a waiver of that portion of our by-laws which requires that the stock should first be offered to the company and then to the stockholders thereof, but in order that every question may be fully disposed of to your entire satisfaction, I will have signed such an agreement as you suggest and have it signed by all stockholders, providing you will prepare same and send it on.

Miss Anna Jungenfeld is not in this country and

hence such signature as may be required of her will have to be made by her attorney in fact, Herman A. Hauessler, Esq.

With a view to covering the two points suggested by you concerning the German Savings Institution stock and that which is held by Dr. Lingenfelder and myself as executors and trustees, I herewith enclose assignments made by them duly witnessed.

Yours very truly,

(Signed) LEO RASSIEUR.

P. S. I also enclose my copy of original agreement duly ratified, upon receipt of which please send me Mr. De La Vergne's copy. L. R."

And that in said letter were enclosed three powers of attorney, all signed by the persons or parties whose names are attached thereto, and in language as follows:

"Know all men by these presents, that we, P. J. Lingenfelder and Leo Rassieur, as executors of the estate of Edmund Jungenfeld, deceased, of the City of St. Louis, State of Missouri, do hereby constitute and appoint ——— our true and lawful attorney for us and in our names and behalf to sell, assign and transfer to John C. De La Vergne, Esq., our ninety (90) shares to us belonging in the capital stock of the Consolidated Ice Machine Company, evidenced by certificate No. 15 of said company, and for that purpose to make all necessary acts of assignment and transfer.

In witness whereof, we have hereunto set our

hands and seals this twenty-third day of April, 1891.

(Signed) P. J. LINGENFELDER, (Seal).
Executor Ed. Jungenfeld, deceased.
(Signed) LEO RASSIEUR, (Seal)
Executor Ed. Jungenfeld, deceased.

Executed in the presence of
(Signed) HUGO MUENCH.

2. Know all men by these presents, that the German Savings Institution, a banking corporation of the City of St. Louis, State of Missouri, does hereby constitute and appoint Hon. Ashbell P. Fitch its true and lawful attorney for it and in its name and behalf, to sell, assign and transfer unto John C. De La Vergne, Esq., its twenty-five shares (25) to it belonging in the capital stock of the Consolidated Ice Machine Company, evidenced by certificate No. 17 of said company, transferred by P. J. Lingenfelder and Leo Rassieur, executors (in whose name the same appeared on the books), by its directions to said John C. De La Vergne, and for that purpose to make all necessary acts of assignment and transfer.

In witness whereof, the said German Savings Institution has hereunto caused its cashier to affix his hand and its corporate seal this twenty-third day of April, 1891.

(Signed) GERMAN SAVINGS INSTITUTION,
(Seal) Richard Hospes, Cashier.

Executed in presence of:

3. Know all men by these presents, that we, P. J. Lingenfelder and Leo Rassieur, as trustees of Carl Jungenfeld, a minor, under the will of Edm. Jungenfeld, deceased, and with full power of disposition over the assets in our hands, of the City of St. Louis, State of Missouri, do hereby constitute and appoint———our true and lawful attorney for us and in our names and behalf to sell, assign and transfer unto John C. De La Vergne, Esq., our seventy (70) shares to us belonging, in the capital stock of the Consolidated Ice Machine Company, evidenced by certificate No. 13 of said company, and for that purpose to make all necessary acts of assignment and transfer.

In witness whereof, we have hereunto set our hands and seals this twenty-third day of April, 1891.

(Signed) P. J. LINGENFELDER, (Seal)
Trustee Carl Jungenfeld, a minor.
(Signed) LEO RASSIEUR, (Seal)
Trustee Carl Jungenfeld, a minor.

Executed in presence of:
(Signed) HUGO MUENCH."

But that said powers, though purporting to be executed on the 23d day of April, 1891, were not actually executed until after the 25th day of April, 1891.

That in the month of July, and later, demand was made by Leo Rassieur on John C. De La Vergne, for the stock provided for in the agreement of April 16th, 1891, and that after said several demands Ashbell P. Fitch, attorney for John C. De La Vergne,

wrote and mailed to Leo Rassieur on September 12th, 1891, the following letter:

"September 12th, 1891.

LEO RASSIEUR, ESQ.

Dear Sir:—I am just out again after a long illness which has prevented my attending to any business for many weeks, and am handed now some letters of yours to Mr. John C. De La Vergne, dated in July and August, in regard to the matters pending between you and others and Mr. De La Vergne, of which I have charge for him.

These letters request the delivery of certain stock of the De La Vergne Company under a contract made April 16th, 1891, between the Consolidated Ice Machine Company and others, and Mr. De La Vergne.

On examining the contract and correspondence, it seems to me that under the contract you were bound within ten days from the date of the contract to fully and properly assign to Mr. De La Vergne all of the stock of the Consolidated Ice Machine Company which had been issued, and it seems to me further that it is clearly shown by my letter of April 27th, 1891, to you and your reply to me dated April 29th, 1891, and by other evidence that this was not done in time in accordance with the contract.

I am also informed that litigation, which has during my illness arisen in the State of Illinois in regard to the charter of the Consolidated Company, would affect the right of the stockholders or of the company to carry into effect such a contract as that of the 16th of April, 1891, even if the stockholders and

the company were not in default under the contract, as it seems to be they plainly are.

I am also informed that there is some question in litigation and otherwise affecting the ownership of the stock of the Consolidated Company.

Pending further information on these points, I have still in my possession the papers which you have sent to me, and sent to Mr. De La Vegne, which of course, if my views as above expressed are correct, I am ready to pass over *to whoever is legally entitled to the custody of the same, which is a question which I am not willing personally to decide.*

I shall be obliged if you will write to me and explain how far my conclusions above mentioned seem to you to be well founded, and also what, from your point of view, the present legal status of the Consolidated Company now is.

I am informed that the attorney-general of the State of Illinois has taken action which must result in the dissolution of the corporation.

I am not yet able to take up my regular work, and am going to Sharon Springs for a couple of weeks, but any letters sent to my office by you will be forwarded to me.

I regret to learn from your correspondence submitted to me that you have also been ill, and hope that you have fully recovered.

Yours sincerely,

(Signed) ASHBELL B. FITCH."

Which letter was received by Leo Rassieur on September 16th, 1891.

It is further agreed that all the stock which Leo Rassieur and P. J. Lingenfelder attempted to transfer, either as trustees or as executors, excepting the 25 shares represented by certificate No. 17, belonged to said E. Jungenfeld at the time of his death and was derived from the estate of Edmund Jungenfeld, deceased, and that said 25 shares represented by said certificate No. 17 was acquired by Leo Rassieur and P. J. Lingenfelder, executors, in payment of a debt owing by Joseph Koenigsberg to said E. Jungenfeld at the time of his death, and that the authority of Leo Rassieur and P. J. Lingenfelder, if they had such authority either as executors of the estate of Edmund Jungenfeld, deceased, or as trustees for Carl Jungenfeld, to sell, exchange or transfer shares of stock in the Consolidated Ice Machine Company, is to be found in the last will and testament of Edmund Jungenfeld, deceased, which is as follows:

"Know all men by these presents, that I, the undersigned Edmund Jungenfeld, being of sound and disposing mind and memory, do make, declare and publish the following as and for my last will and testament, to-wit:

Firstly. It is my wish and will that my mother shall act as the guardian of the person and estate of my daughter Anna, who is now in her care.

Secondly. It is also my wish and will that my friends Louis P. Wilkins and Leo Rassieur shall be appointed as guardians of the person of my son Carl during his minority.

Thirdly. I desire my estate both real and personal to be divided into three equal shares or parts, and I give, bequeath and devise one undivided third thereof or one share to my daughter Anna, one share to my friends P. J. Lingenfelder and Leo Rassieur, as trustees of my son Carl, and the remaining share to Sophia Sander, who has for many years faithfully served me and my family and whose services I desire to acknowledge in a substantial manner.

To have and to hold the said respective shares unto the said Anna, my daughter, and to the said Sophia Sander and unto their heirs and assigns forever, and unto the said Lingenfelder and Rassieur as trustees for my son Carl, and unto their assigns and successors, in the trust hereby created, under the terms and conditions hereinafter set forth.

The said trustees shall retain control of, manage and invest said trust fund until my said son arrives at the age of twenty-eight (28) years when he shall be entitled to the same. My said trustees shall be required to provide him with the means to continue his education, and also provide him with all necessaries; they shall furthermore make him such further allowances and payments as they may deem for his benefit and advantage, having due regard to the use to which the same are to be put and the capacity of my son to take care of such means as may be entrusted to him by my said trustees. My son shall at all times be privileged to require that annual accounts of his estate be rendered him, and in default of such accounting, the Circuit Court of St. Louis City is empowered upon his petition or the

petition of any friend to remove my said trustees and appoint one or more trustees in their places.

My said trustees shall have full power to convey, bargain and sell or lease any and all real estate that they possess and hold as part of said trust fund, and also have power to invest any and all funds in their charge as they may deem proper and profitable for their said trust estate.

Fourthly. I hereby nominate and appoint as executors of this will my said friends, P. J. Lingenfelder and Leo Rassieur, and also request that no bond be required of them in the discharge of their said duties. I give my executors full power to sell, convey and transfer any part or portion of my estate, if they deem it for the advantage of those interested as legatees. I also authorize and empower them to make any payments that I may owe on stock held by me in any incorporated company, particularly, however, the unpaid portion of my stock in the Consolidated Ice Machine Company of Chicago.

In witness whereof, I have hereunto set my hand at St. Louis City this nineteenth day of December, A. D. 1884.

EDMUND JUNGENFELD.

Signed, declared and published as and for his last will and testament by the above subscribed Edmund Jungenfeld, in our presence, who at his request, in his presence and in the presence of each other, have hereunto subscribed their names as witnesses thereof.

P. J. LINGENFELDER, WILHELM LEWITS,
MARY JOESEL, LEO RASSIEUR."

which said will had been duly probated in the Probate Court, City of St. Louis, Mo., and under which will

said Leo Rassieur and P. J. Lingenfelder duly qualified as executors.

It is further agreed that neither of the plaintiffs mentioned in this agreement ever furnished or offered to furnish defendants, or either of them, certificates of stock in the Consolidated Ice Machine Company issued in the name of John C. De La Vergne; and that no effort of any kind was ever made to deliver the stock in the Consolidated Ice Machine Company as contemplated in the said agreement of April 16th, 1891, except as hereinabove stated. That no order of court was ever made to authorize Leo Rassieur and P. J. Lingenfelder, or either of them, either as executors or as trustees, to make the sale or transfer of stocks contemplated by the said contract of April 16th, 1891. That when Ashbell P. Fitch wrote to Leo Rassieur on the 27th day of April, 1891, and thereafter, and all the times heretofore herein mentioned, said Leo Rassieur was the duly authorized agent and attorney of the parties plaintiff herein.

That the provision printed on the certificates of stock hereto attached as Exhibits 2 to 12 inclusive, as part of the by-laws of said Consolidated Ice Machine Company was in fact a part of said by-laws.

It is further agreed that defendants did not within sixty days after the said 25th day of April, 1891; nor did they at any time before or since, issue or deliver to any of the plaintiffs any stock whatever in the defendant company, nor in any other company, nor have they at any time paid any of the plaintiffs any cash money in lieu of stock, although, as is also

admitted to be a fact, plaintiffs have demanded of the defendants the one or the other.

It is further agreed that on the 9th day of October, 1891, an agreement was entered into between creditors of the Consolidated Ice Machine Company, whose claims amounted to over three hundred thousand dollars, looking to a purchase of a part of the assigned property of the said Consolidated Ice Machine Company including its plant and machinery. That of the parties plaintiff herein Fred. Widman, J. W. Skinkle, Leo Rassieur and German Savings Institution were at the time creditors of said company, and as such joined in said agreement. That in pursuance of said agreement two trustees named therein did purchase and acquire for said creditors said entire plant and machinery assigned by said Consolidated Ice Machine Company for about seventy thousand dollars, and that said trustees thereafter sold said plant and machinery for the benefit of all said creditors named in said agreement for about $73,000; but that said plant and machinery were never operated by said trustees, or by said creditors or any of them.

It is further agreed that either party may read from the Revised Statutes of Illinois, 1891 (Hurd's), or from any other authentic revision or publication, in evidence in these causes such portions of the statutes and laws of the State of Illinois as he deems relevant to the issues, subject to objection for relevancy, and the matter so read shall be treated as if set forth in this agreement of fact."

The opinion of the Court of Appeals, reported in 36 U. S. A., 184, and 70 F. R., 146, is also here set out, for the court's convenience, and is as follows:

"The German Savings Institution, a corporation, "the plaintiff in error, brought an action against the "De La Vergne Refrigerating Machine Company, "a corporation, and John C. De La Vergne, the "principal stockholder of that corporation, the de- "fendants in error, for that portion of the purchase "price of the assets, good will and capital stock of "the Consolidated Ice Machine Company, a corpor- "ation, which the defendants in error promised to pay "to it by a written agreement made on April 16, "1891. The plaintiff was a stockholder of the Con- "solidated Ice Machine Company, and the defend- "ants answered that the plaintiff and his co-stock- "holders had failed to assign the stock of that com- "pany as they had promised to do in this agreement. "The case was tried by the court upon an agreed "statement of facts, and a judgment was rendered "for the defendants. These were the material facts:

"The De La Vergne Refrigerating Machine Com- "pany, hereafter called the De La Vergne Company, "was a corporation of the State of New York, and "the Consolidated Ice Machine Company, hereafter "called the Consolidated Company, was a corpora- "tion of the State of Illinois. These corporations "were engaged in manufacturing and selling ice- "making machines and were rivals in that business. "On October 14, 1890, the Consolidated Company "made a general assignment for the benefit of its "creditors. On April 16, 1891, that company and "its stockholders, one of whom was the plaintiff,

"made a bill of sale and an agreement with the De "La Vergne Company and De La Vergne which re- "cites that, 'whereas * * * the assets of "the said party of the first part (the Consol- "idated Company) in the opinion of the said "party of the second part (its stockholders), exceed "in value the liabilities thereof, and consist in part "of the good will of said party of the first part "(which good will has been established by six "years of successful manufacture of refrigerating "and ice-making machines, together with an ex- "penditure of the earnings from such manufacture), "and whereas the said party of the third part (the "De La Vergne Company) is willing to acquire such "rights as the said parties of the first and second "parts can assign in and to the said assets, subject "to the obligations of said party of the first part; * * "Now, therefore, in view of the premises, and for "and in consideration of the mutual advantages to "be gained by the execution of this contract,' the "Consolidated Company and its stockholders 'agree "and covenant to and with the parties of the third "and fourth parts (the De La Vergne Company and "De La Vergne) to bargain, sell and convey, and "by these presents do bargain, sell and convey unto "the said party of the third part, all their right, title "and interest in and to the assets of the said party "of the first part, subject to the payment of its obli- "gations;' the De La Vergne Company and De La "Vergne covenanted and agreed to issue to the "plaintiff in error the full paid capital stock of the "De La Vergne Company to the amount of twenty- "five hundred dollars par value, to issue to its co-

"stockholders a proportionate amount of such stock "so that all the stockholders would receive in the "aggregate $100,000 in such stock; the stockholders "of the Consolidated Company agreed to assign to "De La Vergne, within ten days from the date of "the agreement, all the full paid stock of the Con- "solidated Company, which was one thousaud "shares, to take $100,000 in cash in lieu of the "$100,000 in stock of the De La Vergne Company, "and promised and agreed not to enter into the "business of selling ice-making machines in the "United States, except in the State of Montana, for "ten years, and the De La Vergne Company and "De La Vergne agreed to issue the one hundred "thousand dollars of capital stock in the De La "Vergne Company to the stockholders of the Con- "solidated Company within sixty days after the "stock of the latter company was assigned to De La "Vergne. Within ten days after the date of this "agreement, the certificates which represented the "one thousand shares of the stock of the Consoli- "dated Company, and written assignments of that "stock executed by the parties who held the cer- "tificates, were delivered to De La Vergne, but one "hundred and twenty-five of these shares were held "by P. J. Lingenfelder and Leo Rassieur as ex- "ecutors, and ninety shares were held by them as "trustees under the will of E. Jungenfeld, deceased, "and they assigned these shares without an order "authorizing them so to do from the probate court "in the State of Missouri in which the estate of "Jungenfeld was in the process of administration. "On April 27, 1891, four specific defects in the assign-

"ments of the thousand shares of stock were pointed "out by counsel for De La Vergne, and the means "of curing them were suggested. On April 29, 1891, "these defects were cured by the delivery to the "counsel of De La Vergne of suitable instruments "of further assurance of title. No objection was "made in this letter or at any time prior to April 10, "1893, that the assignments of the executors and "trustees were insufficient because no order of the "probate court had been obtained authorizing the "assignment. On the other hand, the counsel for "De La Vergne wrote on April 27, 1891, respecting "twenty-five of these shares, 'These shares are "transferred by the signature of P. J. Lingenfelder "and Leo Rassieur, executors of Ed Jungenfeld, "deceased, which, of course, would be regular.' "In July, 1891, the former stockholders of the Con- "solidated Company demanded the $100,000 of cap- "ital stock in the De La Vergne Company, but they "received no response to their demand until Sep- "tember 12, 1891, when the counsel for De La "Vergne objected to issuing and delivering this "stock on several frivolous grounds, one of which "was that the stock of the Consolidated Company "had not been assigned *in time*, and wrote, 'Pend- "ing further information on these points, I have "still in my possession the papers which you have "sent me, and sent to Mr. De La Vergne, which of "course if my views as above expressed are correct, "I am ready to pass over to whoever is legally en- "titled to the custody of the same, which is a ques- "tion which I am not willing personally to decide.' "The right to the assets of the Consolidated Com-

"pany subject to its liabilities, and the good will of "its business, which are conveyed to the De La "Vergne Company by the bill of sale and agree- "ment of April 16, 1891, were never reconveyed; "the covenant of the stockholders to refrain from "transacting the ice making business for ten years "was never released, and none of the certificates "and assignments of the stock of that company "were ever delivered back to its former stockhold- "ers. It is assigned as error that upon this state of "facts the judgment should have been for the plain- "tiff.

"One who receives the benefits of the substantial "performance of a contract, and retains them, after "a technical default in the performance by his ad- "versary, until it is impossible to put the latter in "the situation in which he was when the contract "was made, and when the default occurred, cannot "entirely defeat an action for the specific perform- "ance of the contract or an action for the price "named in the agreement on the ground that the "plaintiff has failed to completely perform the con- "tract on his part. When a contract has been par- "tially performed and one of the parties to it makes "default, the other has a choice of remedies. He "may and he must rescind or affirm the contract, "but he cannot do both. If he would rescind it, he "must immediately return whatever of value he has "received under it, and then he may defend against "an action for specific perormance, or for the price "of the property (if the agreement was a contract "of sale) and he may recover back whatever he has "paid or delivered under it. On the other hand, he

"may, and if he retains its benefits he does affirm "the contract, and in that case he can mantain a "suit for specific performance against his adversary "or an action for damages for failure to perform, or "he may, if opportunity offers, offset those damages "against the amount he has agreed to pay under the "contract. He cannot, however, while he retains "the benefits of a substantial performance totally "defeat an action for the price which he has agreed "to pay or for the specific performance of the con-"tract on his part, on the ground that the plaintiff "has not completed the performance required of him "by the contract. He cannot at the same time "affirm the contract by retaining its benefits and re-"scind it by repudiating its burdens. *Hunt* v. *Silk*, "5 East 449; *Hammond, Assignee of Ford*, v. "*Buckmaster*, 22 Vt. 375; *Brown* v. *Witter*, 10 "Ohio 143; *Dodsworth* v. *Hercules Iron Works*, 13 "C. C. A. 552, 557; 66 Fed. Rep. 483. *Swain* v. "*Seamens*, 9 Wall. 254, 272; *Beck* v. *Bridgman*, "40 Ark. 382, 390; *Andrews* v. *Hensler*, 6 Wall. "254, 258; *Conner* v. *Henderson*, 15 Mass. 319, "321; *Teter* v. *Hinders*, 19 Ind. 93; *Howard* v. "*Hayes*, 47 N. Y. Sup. Ct. (Jones & Spencer) 89, "103; *Welsh* v. *Gossler*, 47 N. Y. Sup. Ct. (Jones "& Spencer) 104, 112; *Underwood* v. *Wolf*, 131 "Ill. 425: *Brown* v. *Foster*, 108 N. Y. 387; *Van-*"*derbilt* v. *Eagle Iron Works*, 25 Wend. 665; *Lyon* "v. *Bertram*, 20 How. 149, 153, 154, 155; *Clark* "v. *Wheeling Steel Works*, 53 Fed. Rep. 494, 499; "*Voorhees* v. *Earl*, 2 Hill. 288, 294; *Barnett* v. "*Stanton*, 2 Ala. 181; *Churchill* v. *Holton*, 38 "Minn. 519; *Treadwell* v. *Reynolds*, 21 Am. &

"Eng. Encyc. of Law 557, note 2. The reason of "this principle is, that the retention of the benefits "of substantial performance after default, is utterly "inconsistent with the position that the default has "released the party who has received these benefits "so that he is not bound to perform his part of the "contract. It is a silent notice that performance will "be required of the defaulter and will be made by the "recipient of the benefits. The retention of the "rights or properties deprives the defaulting party "of all use of them, when if they were reconveyed "to him at once upon default, he might immediately "sell them to another for their value or use them "himself to his own advantage. When, therefore, "one has retained such property or the benefits de-"rived from such a contract without any claim that "default has been made or any notice of an intention "to refuse performance, for so long a time after the "default that the defaulting party has been deprived "of a substantial part of their value or their use, it "is unjust and inequitable to permit the recipient of "the benefits to totally defeat an action for the con-"tract price. The just rule is, that the contract "must then stand, that an action upon the contract "can be maintained by him who has substantially "performed notwithstanding his technical default, "and that the amount of the recovery will be meas-"ured by the contract price less the damages sus-"tained by the defendant from the failure of the "plaintiff to complete the performance on his part.

"This rule applies to executory contracts of all "kinds—to contracts for the exchange, for the leas-"ing, and for the sale of real estate (*Beck* v. *Bridg-*

"*man*, *Hunt* v. *Silk; Teter* v. *Hinders*, *Brown* v. "*Witter*, *Swain* v. *Seamens*, *supra*)—to contracts "for the manufacture and sale of machinery and "goods (*Hammond, Assignee of Ford* v. *Buckmas-* "*ter*, *Dodsworth* v. *Hercules Iron Works*, *Andrews* "v. *Hensler*, *Howard* v. *Hays*, *supra*)—and to con- "tracts for the sale of personal property (*Lyon* v. "*Bertram*, *Clark* v. *Wheeling Steel Works*, and "other authorities cited *supra*).

"In *Beck* v. *Bridgman*, 40 Ark. 382, 390, Bridg- "man brought an action against Mrs. Beck to com- "pel specific performance of a contract between "them to exchange real and personal property. "Mrs. Beck had taken possession of Bridgman's "real estate in Illinois, which was covered by the "contract, and he had given her title to all but ten "acres of it, but he could not and never did procure "for her the title to this ten acres. She refused to "convey to Bridgman her lands in Arkansas cov- "ered by the contract, because he had not conveyed "this ten acres, and insisted that he could not "recover on the contract because he had not com- "pleted and could not complete the performance of "it on his part. The court enforced specific per- "formance and allowed Mrs. Beck $300 for the fail- "ure of Bridgman to convey the ten acres. Judge "Eakin in delivering the opinion of the Supreme "Court of Arkansas, which affirmed this decree, "said: 'To allow her to hold all she could get of the "Illinois property and give nothing in exchange "would be absolutely shocking.'

"In *Hammond*, *Assignee of Ford* v. *Buckmaster*, "22 Vt. 375, 379, 380, Ford had agreed with Buck-

"master, the defendant, to manufacture wool furn-
"ished by him into cloth and to deliver the cloth to
"him from time to time as it was manufactured.
"The defendant agreed to sell and consign the
"cloth, to advance to Ford one-third of the selling
"price as fast as the cloth was consigned, and to
"pay to him the residue of the price when it was
"collected, less the value of the wool. Some cloth
"had been delivered to the defendant and had been
"sold and consigned by him. Hammond, the
"assignee of Ford, sued him for the advances he had
"promised to make on these consignments and
"alleged performance on the part of Ford. The
"defense was that Ford had not performed his part
"of the contract, but had converted some of the
"cloth made from the wool of the defendant to his
"own use. The trial court charged the jury that if
"this was true it was a good defense to the action.
"The Supreme Court of Vermont said: 'If the
"charge of the court can be sustained, it must be
"upon the ground, that a breach of the contract on
"the part of Ford gave to the defendant the right
"to repudiate it. But it could not have that effect.
"The general rule of law is, that the contract cannot
"be rescinded by one party, for the default of the
"other, unless both parties can be placed *in statu*
"*quo*, as before the contract. In the present case
"the contract had been in part executed, and each
"party had received a partial benefit from the con-
"tract, and the parties could not be placed *in statu*
"*quo*. The agreement in this case must stand and
"the defendant must perform his part of it; and if
"there has been a breach of the contract by the

"other party, he must seek a compensation in dam-
"ages of such party by a cross action."

"In *Hunt* v. *Silk*, 5 East, 449, Silk agreed to
"make certain alterations in a dwelling house and to
"execute a lease to Hunt within ten days. There-
"upon Hunt paid Silk ten pounds, and took and re-
"tained possession of the house for twelve days.
"Silk failed to make the alterations within the ten
"days, and in twelve days Hunt surrendered posses-
"sion and sued for his ten pounds. Lord Ellen-
"borough said: 'Now where a contract is to be re-
"scinded at all, it must be rescinded in toto, and
"the parties put *in statu quo.* * * * If the
"plaintiff might occupy the premises two days be-
"yond the time when the repairs were to have been
"done and the lease executed, and yet rescind the
"contract, why might he not rescind it after a
"twelvemonth on the same account. This objec-
"tion cannot be gotten rid of: the parties can not
"be put *in statu quo.*' These expressions in this
"opinion, and the decision that Hunt could not re-
"cover in that case were quoted with approval by
"the Supreme Court in *Lyon* v. *Bertram*, 20 How.,
"149, 153, 154.

"Perhaps these cases sufficiently illustrate the rule
"we have been considering, and in our opinion the
"case at bar falls far within it and must be governed
"by it. Conceding that the two hundred and fifteen
"shares of the capital stock of the Consolidated
"Company which were held by Lingenfelder and
"Rassieur as executors or trustees, were never legally
"assigned to De La Vergne, because the assignments
"made and delivered on April 26, 1891, were not

"authorized by any order of the probate court, the
"facts remain that the Consolidated Company and
"its stockholders substantially performed their part
"of this contract and that the defendants received
"and retained all the benefits of their performance.
"The rights and benefits which the defendants were
"to receive from this contract were, the right of the
"Consolidated Company to its assets subject to the
"payment of its debts, the good will of its business
"which had been established for six years, the sup-
"pression of the competition of that company and of its
"stockholders, and the legal control of the suppressed
"corporation. The consideration the defendants
"were to pay for these interests was one hundred
"thousand dollars in stock or in money. They re-
"ceived, retained and had the benefit of all these
"rights and interests, and now refuse to pay the
"agreed price, because the stockholders of the Con-
"solidated Company failed to completely perform
"their contract in that they did not legally assign to
"De La Vergne, who received assignments of more
"than three-fourths of its stock, less than one-fourth
"of the stock of a corporation that had conveyed
"away all of its assets and the good will of its busi-
"ness. There is nothing in this record to show that
"this small minority of the stock was of any value.
"If it was, the defendants may undoubtedly show
"that fact under proper pleadings and offset the
"damage they have sustained by the failure to assign
"it, against the $100,000 they promised to pay for
"the substantial benefits of this contract. But this
"is the limit of their defense, and the burden is upon
"them to establish it. There is no evidence in this

"record that it has any substantial merit, and it is "exceedingly difficult to see how the failure to assign "this small minority of the stock could have resulted "in any damage to them whatever. However that "may be, they did receive and retain the right of "the corporation to its assets subject to its debts, "the good will of its business, the suppression of the "competition of the corporation and its stockholders, "and, by the valid assignment of more than three-"fourths of its stock, the legal control of the cor-"poration. These would seem to be all the benefits, "and they were certainly all the substantial benefits "they could have received from the complete and "technical performance of the contract. After the "conveyance and covenant of April 16, 1891, was "executed and delivered, the corporation was noth-"ing but an empty shell. All its valuable rights and "property had been vested in the De La Vergne "Company, and the legal control of the shell itself "was given to De La Vergne by the valid assign-"ment of a majority of the stock of the corporation. "These defendants cannot retain these benefits and "thus make $100,000 for themselves, and throw a "loss of $100,000 on the stockholders of this cor-"poration because they technically failed to perform "their contract in the slight and immaterial particu-"lar that they did not legally assign a small minority "of this stock.

"In the statement in this opinion that the defend-"ants received and retained all the substantial bene-"fits of this contract, we have not overlooked the "contention of counsel for the defendants that the "letter of their counsel on September 12, 1891, con-

"stituted an offer to return the certificates and assign-
"ments of the stock and should, in law, have the
"effect of their redelivery. That letter was, in sub-
"stance, a refusal to pay the purchase price for friv-
"olous reasons, one of which was that the assign-
"ments were not made in time, because, although
"they were delivered before April 27, 1891, some
"powers of attorney and instruments of further
"assurance of title were, at the suggestion of the
"counsel for De La Vergne, forwarded to him two
"days later, and a statement that if his views were
"correct he was ready to pass over the papers which
"he and De La Vergne had received, to whomsoever
"was legally entitled to the custody of the same,
"which, he wrote, was a question he was unwilling
"to decide. It is not easy to see how this letter was
"an offer to return anything. It was an offer to
"deliver papers to some one on condition that his
"views were correct, but his views were not correct.
"The stipulation in the contract for a delivery of the
"assignments within ten days from its date was for
"the benefit of the defendants, and when their coun-
"sel, after the expiration of the ten days, and after
"the assignments were delivered, pointed out certain
"objections to them and suggested that these objec-
"tions should be remedied by instruments of further
"assurance, and the stockholders of the Consoli-
"dated Company complied with his suggestion and
"forwarded these instruments within two days, and
"no farther objection was made to the sufficiency of
"their performance of the contract until September
"12, 1891, that was a waiver of the objection that
"these instruments were not delivered in time, if, in-

"deed, it was not a waiver of every objection to them. "*Raymond* v. *San Gabriel Val. Land & Water* "*Company*, 4 C. C. A. 89, 53 Fed. Rep. 883; *Wil-* "*coxson* v. *Stitt*, 4 Pac. Rep. 429; *Smith* v. *Mohn*, "25 Pac. Rep. 696; *Kelly* v. *Berry*, 39 Wis. 669, "672; *Smith* v. *Pettee*, 70 N. Y. 13, 17; *Morgan* "v. *Herrick*, 21 Ill. 481; *Irvine* v. *Gregory*, 13 "Gray 215; *Knox* v. *Schoenthal*, 13 N. Y. Sup. 7, 8.

"Moreover, an offer to deliver these papers to the "unknown person who was legally entitled to them, "was not an offer to deliver them to the stockhold- "ers of the Consolidated Company. The person "entitled to them was De La Vergne.

"Further, an offer to return them on September "12, 1891, if sufficient in form would have been an "idle ceremony. The defendants had undoubtedly "then derived all the benefits of a performance of "the contract by the Consolidated Company and its "stockholders that they could ever derive. They "still held the right to its assets subject to its debts, "the good will of its business, and the covenant of "its stockholders which suppressed its competition. "No doubt they had secured its customers and de- "stroyed all possible competition. The return to "the stockholders of the control over the empty "shell of their corporation would have been a useless "act. A merchant cannot, by offering to return "the empty box, successfully defend an action for "the purchase price of a box of goods, on the "ground that the box was defective, when he has "received and sold the goods. The purchaser of a "note and a mortgage securing it cannot, by offer- "ing to reassign the mortgage, after he has col-

" lected and surrendered the note, successfully de-
" fend an action of the purchase price, on the
" ground that the assignment of the mortgage to
" him was defective. And the defendants could
" not, after receiving and retaining for three months
" the right of this corporation to its assets subject
" to its debts, and the good will of its business, and
" after destroying its competition, by offering to
" return the control of the corporation shorn of its
" property and rights, defeat the action for the price
" they agreed to pay because they had not received
" legal assignments of a minority of its stock.

" The contention that this action for the specific
" performance of this contract cannot be maintained
" under the decisions in *Norrington* v. *Wright*, 115
" U. S. 188; *Hoare* v. *Rennie*, 5 H. & N. 19;
" *Bowes* v. *Shand*, L. R. 2 App. Cas. 455; *Honck*
" v. *Muller*, L. R. 7 Q. B. D. 92; *Reuter* v. *Sala*,
" L. R. 4 C. P. D. 239, and like cases, until the
" plaintiff proves a complete and technical perform-
" ance of the contract, on the part of the Consoli-
" dated Company and its stockholders, has not
" escaped consideration. The distinction between
" those cases and the case at bar is, that the defend-
" ants in the former had not received and retained
" anything under the contracts, for which they had
" not paid the contract price, while the defendants
" in this case have received and retained all the ben-
" efits of a substantial performance of the contract
" and have paid nothing. Those were actions for
" the purchase price of goods, no part of which had
" been accepted and used by the defendants without
" paying therefor. This is an action for the pur-

"chase price of property and rights which the de-
"fendants have received and enjoyed the benefits
"of. The distinction is clearly pointed out by the
"Circuit Court of Appeals of the Third Circuit in
"*Clark* v. *Wheeling Steel Works*, 53 Fed. Rep. 494,
"498, where that court justly remarks: 'If the
"defendants in *Norrington* v. *Wright* had retained
"and used the railroad iron delivered to them after
"they had discovered the seller's failure to ship the
"stipulated quantities in February and March, they
"would not have been justified in rescinding their
"contract.' This distinction is noted by Mr. Jus-
"tice Gray in the opinion in *Norrington* v. *Wright*,
"where he says: 'This case wholly differs from
"that of *Lyon* v. *Bertram*, 20 How. 149, in which
"the buyer of a specific lot of goods accepted and
"used part of them with full means of previously
"ascertaining whether they conformed to the con-
"tract.' The case at bar is not ruled by *Norring-*
"*ton* v. *Wright* and like cases, but falls within the
"principle announced at the opening of this opinion
"and is governed by *Lyon* v. *Bertram* and other
"cases cited in support of it.

"If it is said that the defendants were not aware
"that the assignments made by the executors and
"trustees were not authorized by orders of the pro-
"bate court, and hence that they were excused from
"rejecting them and returning the property which
"they had received, the answer is, that it was as
"easy for them to ascertain that fact in May and
"June of 1891, when these parties could have been
"placed *in statu quo*, as it was on April 10, 1893,
"after they had derived all the benefits of the con-

"tract, when they first raised the point by their "answer in this case. Moreover, the rule *caveat* "*emptor* governed them. They knew the law. They "had notice of all the facts that the diligent inquiry "of a reasonably prudent man would have discovered, "and they had reserved to themselves by the con- "tract sixty days after the assignments were deliv- "ered, to examine them and decide upon their suf- "ficiency before they were required to pay. The "fact that the assignments were executed by execu- "tors and trustees was notice sufficient to cast upon "them the duty to investigate the authority of these "officers, to object to it if insufficient, and to return "the property they had received within the sixty "days provided by the contract, or to forever after "hold their peace. They could not lawfully refuse "to investigate this question until they had appro- "priated to themselves all the benefits of the con- "tract and made it impossible for them to restore "the Consolidated Company to their original situa- "tion, and then for the first time make the investi- "gation and repudiate their obligations under the "contract.

"The judgment below must be reversed and the "cause remanded with directions to grant a new trial, "and it is so ordered."

It will be observed that in the opinion of the Court of Appeals the plaintiffs were entitled to recover from defendants the $100,000.00 stipulated to be paid by the contract, but that possibly under amended pleadings, and upon a further showing of the facts,

defendants might be able to reduce the amount thereof by showing that the shares of stock concerning the title to which in defendants some doubt existed, had a value; respecting which, however, the court added: "There is nothing in this record to show that this small minority of the stock was of any value. If it was the defendants may undoubtedly show that fact under proper pleadings, and offset the damage they have sustained by the failure to assign it, against the $100,000.00 they promised to pay for the substantial benefits of this contract. *But this is the limit of their defense, and the burden is upon them to establish it.* There is no evidence in this record that it has any substantial merit, and it is exceedingly difficult to see how the failure to assign this small minority of the stock could have resulted in any damage to them whatever."

The causes having thus returned to the Circuit Court, the defendants filed amended answers therein, which answers will be found on page 18 of the printed transcript. When analyzed and condensed the answers will be found to present the following pleas:

1. After admitting the incorporation of the De La Vergne Company and its non-residence, and that of defendant De La Vergne, all other allegations of the petition are generally denied, under the practice sanctioned by the Missouri code of practice.

2. A denial that any assets of the Consolidated Company ever came into the possession of defendants, but that all of said assets remained in the custody and possession of the assignee and were by him disposed of in due course of law, for

the benefit of the Consolidated Company's creditors; and that said assets were insufficient to discharge the established liabilities of said company. That no assets of said company were ever tendered to or received by defendants under the contract. That plaintiffs failed to assign or transfer to defendants any of the shares of stock, either within the time provided for by the contract, or at any time prior to the institution of the suit. That plaintiffs did not observe their covenants to refrain for ten years from the date of the contract from entering into or becoming connected with the sale of refrigerating or ice making machines, but on the contrary did violate said covenants by embarking in such business.

3. That De La Vergne had no authority to execute said contract on behalf of the De La Vergne Co.; that no benefits of any kind accrued to said company under said contract; that it never accepted or received any assets of said Consolidated Co., nor any of the stock of said company; and that it never in any manner ratified or approved said contract, but rejected the same.

4. That plaintiffs consented to and acquiesced in an abandonment of the contract.

5. That the contract was not authorized by the Consolidated Co. and that it was made without the authority of said company. That all of the stockholders of said company did not unite in said contract, and that the estate of Edward Jungenfeld, which owned 90 of said shares of stock, did not agree

to said contract, nor were the executors of said estate authorized to transfer the stock thereof; that Carl Jungenfeld, a minor, who owned 70 of said shares, did not agree to said contract and was not bound thereby.

6. That the contract was *ultra vires* the De La Vergne Co.

7. That the contract was void, as against public policy.

8. That the contract was void because it *required* the De La Vergne Co. to increase its capital stock from $350,000.00 to $2,000,000.00.

It will be observed that no effort was made by the amendment of the answers to adopt or meet the suggestions of the appellate court respecting the possible abatement of the $100,000 agreed to be paid by defendants; and upon the retrial no attempt was made by defendants to establish any such abatement.

Mr. De La Vergne having died the public administrator of St. Louis, in charge of his estate in Missouri, was substituted as a defendant in his place, and the causes having again been reached by the trial court, were ordered consolidated.

Thereupon, to make out their case, plaintiffs offered in evidence the written agreed statement of facts, upon which the case had been before tried, and upon which the Court of Appeals had held that plaintiffs were entitled to recover *prima facie* the amount of $100,000; and also offered certain formal proof respecting De La Vergne's death and the action of the Public Administrator and of the Probate Court

of the City of St. Louis thereon. Upon this proof the plaintiffs rested their case.

Defendants read in evidence lengthy depositions taken in the cities of Chicago and New York; those taken at the former place were offered for the purpose of supporting the plea that plaintiffs had violated their covenant to refrain from entering the ice-machine business, and those taken at the latter place were offered for the purpose of establishing the plea that the De La Vergne Co. had neither authorized nor ratified the contract.

At the request of defendants the court made a special finding of the facts, in which it specifically finds that neither of these defenses were established. (Printed transcript, p. 407.) The court further finds the facts to have been as set forth in the agreed statement of facts, except as modified by the special finding, the only modification consisting of the foregoing findings in favor of the plaintiffs, and that there was no violation of their express covenant; and also finding that when the contract was entered into "the value of said Consolidated Company's assets and good will, *in the opinion of defendants*, exceeded its liabilities."

Thereupon the court entered judgment in favor of the plaintiffs for the full amount sued for, together with interest, and defendants sued out a writ of error to the Circuit Court of Appeals.

When the case was thus reached for the second time in the latter court the bench was composed of Sanborn and Thayer, circuit judges, and Phillips,

district judge, the latter sitting in the place of Judge Caldwell, who was sick. Judge Phillips, having tried the cases the first time in the circuit, did not sit in the appellate court; the case was therefore submitted before Sanborn and Thayer, judges.

On January 31, 1898, the judgment of the Circuit Court was affirmed, Judges Sanborn and Thayer agreeing upon every contention made and presented, in favor of the plaintiffs, but differing on the question of whether the contract in question was *ultra vires* the De La Vergne Co., and the judgment was therefore affirmed by a divided court. The opinion filed is very brief, and is as follows:

"Before Sanborn and Thayer. Per Curiam. The judges are divided in opinion upon the question whether or not the contract which is the basis of this action was *ultra vires* the De La Vergne Refrigerating Machine Company, and are of the opinion that the other questions presented should be determined in favor of the defendants in error. The judgment below is therefore affirmed by a divided court."

The question of *ultra vires* was presented to the Circuit Court and to the Court of Appeals upon an act of the Legislature of the State of New York, making it illegal for a New York corporation to invest any of its funds in the purchase of stock of another corporation. This provision was adopted in 1848, and was in force when the De La Vergne Co. was organized in 1880; but the attention of those courts was not drawn to the fact, as is the attention of this court now, that in 1853 and 1866 amendatory

acts were passed expressly authorizing such purchases to be made. These provisions of the New York law will be referred to in the brief and argument.

The opinion of the Court of Appeals having been filed, the De La Vergne Co. secured a writ from this court ordering the case to be sent here for determination.

BRIEF.

I.

The contract involved in this cause was not *ultra vires* the De La Vergne Co.

(a) The subject-matter of the contract, the thing bargained for and purchased, was not stock of the Consolidated Co., but its tangible assets, its outstanding accounts and its good-will, subject to the payments of its debts, and the custody thereof until such payment, by the Illinois assignee.

German Savings Institution v. De La Vergne Refrigerating Machine Co., 36 U. S. App., 184; s. c. 70 F. R., 146.

(b) But if stock of the Consolidated Co. was the subject-matter of the purchase by the De La Vergne Co., the contract was not *ultra vires*, because the laws of the State of New York did not prohibit such purchase, as contended by the De La Vergne Co., *but on the contrary permitted it.*

Laws 1853, Chap. 331, Sec. 2.
Revised Statutes, N. Y. 1889, Vol. 3, p. 1961.
Laws of 1866, Chap. 838, Secs. 3 and 4.
Rev. Stat. N. Y., 1889, Vol. 3, p. 1967.

II.

The contract was not *ultra vires* as requiring or obligating the De La Vergne Co. to increase its capital stock.

The contract itself recites that the De La Vergne Co. was then considering the plan of increasing its stock, and by the contract it was left optional with said company either to make such increase and to pay plaintiffs with such increased issue, or to pay in money.

But even if the contract had required such increase and the De La Vergne Co. had no power to contract therefor and for the payment in such form, it will nevertheless be compelled to make compensation in some other form; in money.

Hitchcock v. Galveston, 86 U. S., 51.
Fort Worth City Co. v. Smith Bridge Co., 151 U. S., 294.
State Board v. Ry. Co., 47 Ind., 407.
Parish v. Wheeler, 27 La. Ann., 449.
Morawetz on Corporations, Sec. 86.
Mo. Pac. Ry. Co. v. Sidell, 36 U. S. App., 152.
Bensiek v. Thomas, 27 U. S. App., 765.

III.

The contract was not *ultra vires* the Consolidated Company because it was not a mere combination or coalition for the purpose of creating a monopoly or trust; but was a legitimate business undertaking.

Morawetz, Sec. 212.
Herriman v. Menzies, 115 Cal., 16.
Oil Creek Co. v. Pa. Trans. Co., 83 Pa. St., 160.
Whitney Arms Co. v. Barlow 63 N. Y., 62.

Gasquet v. Carson City Brg. Co., 49 F. R., 496.

Camden Co. v. May's Ldg. Ry. Co., 48 N. J. L., 567.

IV.

The De La Vergne Company's execution of the contract is fully established.

(a) The answers denying its executions are not verified, and thereby the execution stands admitted. Rev. Stat. Mo., 1889, Sec. 2186.

(b) And such admission, by failure to verify, is not merely with reference to the formal or clerical execution, but includes the admission of substantial execution.

Rothschild v. Frensdorf, 21 Mo. App., 318.

Smith Co. v. Rembaugh, 21 Mo. App., 390.

Lithographing Co. v. Obert, 54 Mo. App., 240, (246).

(c) The testimony furnished by defendants themselves establishes a ratification of the contract by the De La Vergne Co., even if the president had no original authority to execute it. The corporation paid the services and expenses of the experts employed to investigate the affairs of the Consolidated Co.; the directors were acquainted with the execution of the contract and the disbursement of these moneys and made no objection thereto; the by-law of the defendant corporation gives the president unlimited powers to enter into contracts on its behalf; within five days after the contract was executed the

defendant company employed the Consolidated Co.'s former salesman, took charge of its former New York branch office and entered upon the business of selling machines built upon the Consolidated type or pattern.

(d) The agreed statement of facts *admits* the execution of the contract by both De La Vergne and the De La Vergne Co.

(Printed transcript, p. 39.)

V.

Where a contract admits of two constructions, one of which results in its validity and the other in its illegality, the former will be adopted.

Shore v. Wilson, 9 Clark & F., 397.
Noonan v. Bradley, 9 Wall., 394 (407).
Ormes v. Deuchy, 82 N. Y., 443.
Curtis v. Gokey, 68 N. Y., 304.
Sheffield v. Balmer, 52 Mo., 474.
Crittenden v. French, 21 Ill., 598.
2 Parsons on Contracts, (8 ed.) 168.
Jones on Construction of Contracts, Secs. 223, 224.
Bishop on Contracts, Sec. 392.

VI.

Jungenfeld's executors had power to assign the stock of that estate without an order of court. At common law the legal title to the personalty of the deceased passes to his executor or administrator, who has absolute control and dominion over the same.

with power of alienation; and the conveyance of the executor or administrator passes good title to the vendee or assignee.

Williams on Executors, (Ed. 1859) p. 269.
Woerner on Amer. Law of Administration, Sec. 331.
3 Wait's Act. & Def., 244, and cas. ci.
Downing v. Garner, 1 Mo., 749, (reprint 537.)
Makepeace v. Moore, 10 Ill., (5 Gilm.) 474.
McConnell v. Hodson, 7 Ill., (2 Gilm.) 640.
Walker v. Craig, 18 Ill., 116.
Thornton v. Mehring, 117 Ill., 55.

In those States where Administration Acts have been adopted the rule is that an executor or administrator selling personalty without the sanction of the court possessing probate jurisdiction, makes himself answerable for the full value of the property; but his sale is not void—on the contrary his *bona fide* vendee obtains good title. Administration Acts are in aid, not in exclusion, of the common law powers of the legal representative.

Schouler's Executors & Administrators, (2 Ed.,) Sec. 346.
Smith's Probate Law, (Mass.) 111.
Harth v. Heddlestone, 2 Bay's Rep. (S. C.) 321.
Mead v. Byington, 10 Vt., 116.
Sherman v. Willett, 42 N. Y., 146.
Dickson v. Crawley, 112 N. C., 629.
Minuse v. Cox, 5 Johns., Ch. 441.
Wynns v. Alexander, *2 Dev. and B. Eq. Rep.*, *58*.

An exception to this rule seems to exist in Missouri with respect to bonds and promissory notes. The cases of

Stagg v. Green, 47 Mo., 500.
Stagg v. Linnenfelser, 57 Mo., 337.
Chandler v. Stevenson, 68 Mo., 450.
Weil v. Jones, 70 Mo., 56,

merely go to this effect and no further.

State to use of Wolf v. Berning, 74 Mo., 87, merely holds that an administrator, *de bonis non*, may reclaim notes pledged by his predecessor, *for his own purposes*, with one having notice of that fact and of their true ownership.

These were the cases relied on in the lower court by defendants.

The Missouri Administration Act provides that executors or administrators may make compromises with and execute releases to debtors of the estate, *upon orders from the Probate Court*. Yet it has been held that a release *without such direction or sanction* will be good, the executor being personally liable for any loss caused by his lack of due care or prudence.

Mosman v. Bender, 80 Mo., 579.
Jacobs v. Jacobs, 99 Mo., 427.

And to the same effect, this court in *Maclay v. Equit. Life Ass. Soc.*, 152 U. S., 499.

VII.

The will of Jungenfeld in express terms authorized his executors "*to sell, convey and transfer any part*

or portion of my estate if they deem it for the advantage of those interested as legatees." Their assignment to defendants was therefore effectual, both under the will and by reason of their general legal power.

VIII.

Executors may convey title to shares in a corporation organized under the laws of a foreign jurisdiction. "The assignee of stock assigned by a foreign executor may compel the transfer thereof in the courts of the State where the corporation does business."

Middlebrook v. Merchant's Bank, 3 Abb. App., Dec. 295.
Same Case on Appeal, 41 Barb., 481.
Luce v. R. R., 63 N. H., 588.
Brown v. Gas Light Co., 58 Cal., 426.
Trecothick v. Austin, 4 Mason's C. C. Rep., 16.

IX.

The trustees of Jungenfeld's minor son also had power to assign and transfer the minor's stock to defendants. The will gave them general power to "*manage, control and invest*," and it was manifestly the intention of the testator to confer upon them the power of sale. Such power need not be granted by express words, but may be inferred where the intention is apparent.

18 Am. & Eng. Enc., "Powers," 901 and cases collected.
Danish v. Disbrow, 51 Tex., 235.
Orr v. O'Brien, 55 Tex., 149.

X.

There is no presumption of law that one acting in a trust capacity has the right to sell. Persons dealing with a trustee are put on inquiry and are bound to ascertain for themselves the extent of his power, and what title, if any, they will obtain by the trustee's conveyance.

German Saving Institution v. De La Vergne Ref. Mach. Co., 36 U. S. App., 184.
Duncan v. Jandon, 82 U. S., (15 Wall), 165.
Mason v. Wait, 5 Ill., 127 (135).
Brewer v. Christian, 9 Ill. App., 57.
Harmon v Smith, 38 F. R., 482.
Shaw v. Spencer, 100 Mass., 382.
Wood's Appeal, 92 Pa. St., 379.
Godefroi's Law of Trusts, p. 360.
2 Shouler's Personal Property, Sec. 383.
Woerner on Am. Law of Administration, p. 1,077.

XI.

An agreement to tranfer or assign stock is sufficiently performed by a delivery or an offer of certificates therefor assigned in blank.

23 Am. & Eng. Enc., "*Stock*," p. 685 and cases there collated.
Keller v. Eureka Brick Mfg. Co., 43 Mo. App., 84.

XII.

The suggestion made below by defendants that because the Consolidated Co. had assigned all of its

property for the benefit of its creditors, and that therefore neither it nor its stockholders possessed any right which could be conveyed by the agreement of April 16, 1891, is without merit.

Under the Illinois assignment laws a right of reconveyance from the assignee existed on an adjustment with a majority in number and amount of the creditors; and it was this right or equity which defendants purchased and the agreement expressly so recites. In addition thereto defendants also secured the good will and trade of the Consolidated Company and the express covenant of its stockholders, plaintiffs herein. Defendants got all for which they bargained.

XIII.

The special finding of facts made by the court below is conclusive on appeal as to the matters found.

Stanley v. Albany Co., 121 U. S., 35.
Allen v. St. Louis Nat'l Bk., 120 U. S., 20.
Bridge Co. v. R. R. Co., 92 U. S., 315.

Where a cause is tried upon waiver of jury and the court makes a special finding of the facts, the only question upon the writ of error is the sufficiency of the facts found to support the judgment. The appellate court will not inquire whether the evidence was sufficient to support the findings.

Wile v. Farmer's State Bk., 17 C. C. A., 25; s. c. 70 F. R., 138.

Minchen v. Hart, 18 C. C. A., 570; s. c. 72 F. R., 294.

Woodbury v. Shawneetown, 20 C. C. A., 400; s. c. 74 F. R., 205.

Nor is error in the findings of fact subject to revision, if there was *any* evidence upon which the findings could be made.

Hathaway v. Bank, 134 U. S., 494.

And special findings of facts by the court need only state the *ultimate facts*, not the evidence.

Mining Co. v. Taylor, 100 U. S., 37.

And a refusal of the trial court to find incidental facts, amounting only to evidence bearing upon the ultimate facts to be found, is not a proper subject of review.

Hathaway v. Bank, 134 U. S., 494.

XIV.

The refusal of the trial court where a jury has been waived to give abstract declarations of law, is not error.

Mercantile Mut. Ins. Co. v. Folsom, 18 Wall, 237.

XV.

The contract in question, providing as it did for a distribution of $100,000 to the various plaintiffs, in the proportion in which they held stock in the Consolidated Co., amounted to a promise to each; and each was therefore waranted in bringing a separate

action for the proportionate amount due him. A general action would have been improper.

Parsons on Contracts, —— —— ——
Bliss on Code Pleadings, Sec. 3.
Taylor vs. Coons, 48 N. W., 123.
Finney v Brant, 19 Mo., 43.
Cross v. Williams, 72 Mo., 577.

XVI.

Neither party to a contract can rescind without placing the other in *statu quo*. Nor when sued for the purchase price successfully defend while retaining its benefits.

Ger. Savings Institution v. De La Vergne Ref. Mach. Co., 36 U. S. App., 184, and cases there cited.
Story on Sales, Sec. 427.
Bigelow on Estoppel (5 Ed.), 552.
3 Wait's Act. & Def., 483.
Mansfield v. Trigg, 113 Mass., 350.
Miller v. Tiffany, 1 Wall, 298.
Andrews v. Hensler, 6 Wall, 254.
Reeves v. Corning, 51 F. R., 774.
Union Nat'l Bank v. Matthews, 98 U. S., 621.
Washburn Mill Co. v. Bartlett, 54 N. W. Rep., 544.

ARGUMENT.

I.

We propose to discuss first the proposition advanced by the defendants that the contract in question was *ultra vires* the De La Vergne Company. This argument proceeds on the theory that the thing contracted for and bargained to be sold, and sold by the contract or agreement, was *stock* and not the right to secure the assets and the good will of the Consolidated Company, by appropriate acts and proceedings, on the part of the defendants.

This argument was accepted as sound by Phillips, J., upon the first trial, but was not sanctioned by the judgment of the Court of Appeals. On the contrary, that court holds that defendants did receive and did retain "the right of the corporation to its assets, subject to its debts, the good-will of its business, the suppression of the competition of the corporation and its stockholders, and by the valid assignment of more than three-fourths of its stock, the legal control of the corporation. These would seem to be all the benefits they could have received from the complete and technical performance of the contract. After the conveyance and covenant of April 16th, 1891, was executed and delivered the corporation was nothing but an empty shell. All its valuable rights and property had been vested in the De La Vergne Co., and the legal control of the shell itself was given to De La Vergne by the valid assignment of a majority of the stock of the corporation."

Thus the court construes the contract in the only fair way in which it can be construed, as a transfer and conveyance of all the assets of the Consolidated Company, by said company and all its stockholders, subject to the payment of its debts; and also the transfer and conveyance of its good-will, subject only to the same conditions; and the stock of this corporation, which had thus disposed of all its assets, and which by the covenant of all its stockholders was practically wound up and the shares thereby made valueless for all practical purposes, was merely assigned to defendant De La Vergne in order to enable him and his company more readily and completely to secure possession of those assets, and of the good-will and trade, from the legal custodian, the assignee. As stock, the shares in themselves possessed no value because by the contract itself whatever surplus of property the corporation might possess after its debts were paid, went, under the terms thereof, to the De La Vergne Co. and to the plaintiffs. That is, the assets of the company were transferred to the De La Vergne corporation and the $100.000.00 of value which all the parties to this transaction believed the assets to possess over and above the indebtedness, went in certain proportions to the stockholders of the Consolidated Co.

It would be, therefore, a strained interpretation of the contract which would hold it to mean that the subject matter, the principal thing covered by it, was this stock, and not the assets and good-will, which latter were the things in which the De La Vergne Co. was mainly interested. And this was the view

of the Court of Appeals when it referred to the alleged offer of defendants to return the shares of stock in September, 1891, to "*whoever was legally entitled to them.*" "An offer to return them on "September 12, 1891, if sufficient in form, would "have been an idle ceremony. The defendants had "undoubtedly then derived all the benefits of the "performance of the contract by the Consolidated "Co. and its stockholders, that they could ever "derive. They still held the right to its assets, sub- "ject to its debts, the good-will of its business, and "the covenant of its stockholders, which suppressed "its competition. No doubt they had secured its "customers and destroyed all possible competition. "The return to the stockholders of the control over "the empty shell of their corporation would have "been a useless act. A merchant could not, by "offering to return the empty box, successfully "defend an action for the purchase price of a box of "goods, on the ground that the box was defective "when he received and sold the goods. * * * "And the defendants could not, after receiving and "retaining for three months, the right of this corpo- "ration to its assets, subject to its debts, and the "good-will of its business, and after destroying its "competition, by offering to return the control of "the corporation, shorn of its property and rights, "defeat the action for the price they agreed to pay, "because they did not receive legal assignment of a "minority of its stock."

And it may be remarked here that when the Court of Appeals announced the foregoing, they had before them merely the agreed statement of facts; the

depositions since taken by the defendants themselves demonstrate beyond all room for question that what benefits the court said defendants had undoubtedly derived from the contract were in fact derived, and they have been retained by defendants ever since. And not only have defendants obtained the benefits of the contract and the only benefits they were interested in, and not only have they never released nor offered to release the plaintiffs from their covenant, but they have never offered to return even the stock received on April 25, 1891, nor one share of it.

We therefore submit that the question of *ultra vires* is not in this case, because the subject of sale by plaintiffs, and of purchase by defendants, was not the *stock* of the Consolidated Co., but its assets, good-will, and the agreement of its stockholders to remain out of the refrigerating business for a period of ten years. The stock was merely the vehicle or the handle by which the assets could better be controlled. It is folly to believe that defendants would have paid $100,000.00 for the stock, *as stock*. We believe it was on this view that *Sanborn*, Judge, held that the contract was not *ultra vires*, because the following statutory provisions of New York were not before him at the time; which provisions, in our opinion, still greater simplify the controversy.

The De La Vergne Co. was organized under the general incorporation Act of New York, adopted in 1848. Section 8 provides as follows: "It shall not be lawful for such company to use any of their funds in the purchase of any stock in any other corporation."

When the case was submitted and argued below it was upon the impression that such continued to be the state of the law in New York upon this subject, until the time when the contract under discussion was entered into. Counsel for plaintiffs, relying confidently upon the position that the stock of the Consolidated Co. was not the consideration for which the defendants had agreed to pay the amount sought to be recovered, made no minute investigation into the laws of New York.

Since the affirmance of the judgment, however, by the court of appeals it has been discovered that such was not the law of the State of New York in April 1891. On the contrary, by the Laws of 1853 power was given to manufacturing companies, such as the De La Vergne Co. was, to acquire "mines, *manufactories* and *other property necessary for their business*," the provision quoted from appearing in Section 2 of Chapter 333, of the Laws of 1853, said Section being literally as follows:

"The trustees of such company may purchase mines, *manufactories*, and other property necessary for their business, and issue stock to the amount of the value thereof in payment therefor; and the stock so issued shall be declared and taken to be full stock." (Statutes of 1889, p. 1961.)

And by an Act in 1866 it was further provided in New York that a manufacturing corporation might acquire stock in another manufacturing corporation and that the officers of the purchasing corporation might hold office as trustees of the corporation in which their company so acquired stock, in the same

manner as if they owned said stock individually. The Act to which we refer appears in the Laws of 1866 at Chapter 838, Section 3, and is as follows:

"It shall be lawful for any company heretofore or hereafter organized under the provisions of this Act, or the Act hereby amended, *to hold stock* in the capital of any corporation engaged in the business of mining, *manufacturing*, or transporting such materials as are required in the transaction of the business of such company, and for two years thereafter and no longer; and also to hold stock in the capital of any corporation which shall use or manufacture material mined or produced by such company; and the trustees of such company shall have the same power with reference to the purchase of such stock and issuing stock therefor, as are now given by the law with reference to the purchase of mines, manufactories and other property necessary to the business of mining, manufacturing and other companies. (Laws of 1853 *supra*.) But the capital stock of such company shall not be increased without the consent of the owners of two-thirds of the stock, to be obtained as provided by Sections 21 and 22 of the Act hereby amended."

"Section 4. When any such manufacturing company shall be a stockholder in any other corporation, its president or other officers shall be eligible to the office of trustee of such corporation the same as if they were individual stockholders therein."

Statutes of N. Y., 1889, Vol. 3, p. 1963.

All of the foregoing provisions were in full force and in full effect at the time when the De La Vergne

Company was incorporated and at the time when the contract out of which these actions arose was entered into.

They furnish ample power and authority to the De La Vergne Company to make the purchase of the rights of the Consolidated Company and its stockholders to the assets of the Consolidated Company, including the good-will of that company; and if it became necessary, or in the opinion of the De La Vergne Company it was necessary, to secure as a vehicle or means for better acquiring the custody of these assets, the shares of stock issued by the Consolidated Company, these same statutory provisions are amply broad enough to justify the acquisition of such shares. The language of the statute is that a corporation may purchase such "*manufactories and other necessary property.*" If, therefore, it be true, as urged by counsel for the De La Vergne Company that that company could not obtain possession of the property transferred to it by the conveyance of April 16, 1891, under the assignment laws of Illinois, excepting upon the petition of the assignor, and that therefore it was necessary to own the stock of the assignor, then under the statute just referred to such stock became "other necessary property."

In the brief submitted on behalf of the De La Vergne Company in the Court of Appeals, it was asserted that the law down to 1891 continued to be in New York as it was in 1848, and therefore prohibitive, in express language, of the right of a corporation to use any of its funds in the purchase of stock in any other corporation.

Whether the foregoing statutory provisions subsequently adopted were omitted through inadvertence or because counsel were not aware of them, we do not know; but it is certain that they are conclusive upon the question of *ultra vires*, which is presented in this case, upon their theory that stock, and stock only, was the subject matter of the contract, and practically remove that question from the controversy.

Upon their aspect of the case counsel relied greatly upon the case of *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S., 24. But that was a case of a *quasi*-public corporation entering into a contract wholly beyond the scope of its power, and a contract which would result in an injury to the public. This court in the course of its opinion makes these facts prominent, saying:

"The plaintiff, therefore, *was not an ordinary* "*manufacturing corporation*, such as might, like a "partnership or an individual engaged in manu- "factures, sell or lease all its property to "another corporation. *Ardesco Oil Company v.* "*North American Oil & Mineral Company*, 66 "Pa., 375; *Treadwell* v. *Salisbury Manufacturing* "*Co.*, 7 Gray, 393. But the purpose of its incorpo- "ration as defined in its charter and recognized and "confirmed by the legislature, being the transporta- "tion of passengers, plaintiff exercised *a public em-* "*ployment* and was charged with a duty of accom- "modating the *public* in the line of that employ- "ment, exactly corresponding to the duty which a "railroad corporation or a steamboat company, as a

"carrier of passengers, owes to the public, indepen-
"dently of possessing any right of eminent domain.
"The *public nature* of that duty was not affected by
"the fact that it was to be performed by means of
"cars constructed and of patent rights owned by the
"corporation, and from rights owned by others.
"The plaintiff was *not a strictly private*, but a *quasi*
"*public* corporation; and it must be so treated as
"regards the validity of any attempt on its part to
"absolve itself from the performance of those du-
"ties *to the public*, the performance of which, by the
"corporation itself, was the remuneration that it
"was required by law to make to the public in return
"for the granting of its franchise."

This case, therefore, instead of being favorable to the position assumed by defendants, is authority supporting the validity of the contract assailed; for it expressly recognizes the right of a *private manufacturing corporation* to do that which is denied to one engaged in a public or *quasi*-public employment.

The ultimate facts found by the Circuit Court, and also by the Circuit Court of Appeals, to be established by the evidence, will be accepted by the Supreme Court of the United States.

Stuart v. Hayden, 169 U. S., 1.

Since, therefore, it is quite clear that the contract in question was not one which involved the purchase of stock by the De La Vergne Co., and since both the Circuit Court and the Court of Appeals have so found and declared, it will serve no useful purpose to analyze and consider in detail each of the cases which plaintiff in error cited in the brief filed in its

behalf before the Court of Appeals, and which undoubtedly will again be cited in this court. It is sufficient to say that they all follow the type of *Central Transportation Co.* v. *Pullman's Palace Car Co.*, and on investigation will be found to be cases involving contracts made by *quasi public corporations*, involving an abnegation by such corporations of a duty which they owe to the public. The cases will be found to affect the rights of such corporations as common-carriers, gas companies, banking corporations and the like; all of a semi-public character. The law declared in those cases has no application here, because the contract of purchase was not one involving the stock as the subject matter to be paid for.

We may, however, add that in recent years the tendency of the courts has been to abridge and limit the right of a corporation to set up the plea of *ultra vires* by way of defense to an executed contract, the benefit of which it has obtained and the benefit of which it retains. Particularly will such plea not be tolerated where it can only result in injustice.

Morawetz on Corporations, Sec. 100, and cases cited.

But we conclude the discussion of this point by reiterating that the plea of *ultra vires* is not in the case: first, because the contract was not one for the purchase of the Consolidated Co.'s stock; and second, because under the laws of New York the De La Vergne Co. had the power to invest in the stock of a manufacturing corporation such as was the Consolidated Co.

II.

Not having at this time the benefit of the brief to be presented on behalf of plaintiff in error and not knowing just what points in addition to the plea of *ultra vires* will be pressed in its behalf upon this court, we are compelled to anticipate that such points will again be presented as were relied upon before the Court of Appeals.

It was there contended that the contract was also *ultra vires* the De La Vergne Company upon the further ground that the contract required that company to *increase* its capital from $350,000 to $2,000,000, and to distribute among the plaintiffs $100,000 of the increased issue.

An all-sufficient answer to this point is that the contract does not *obligate or require* the De La Vergne Company to make any increase of its stock. The preamble to the contract recites that that company "*is now considering a plan of so increasing the capital stock of said company as will enable said company to have a full paid capital of $2,000,000.*"

But nowhere does the contract make it *incumbent* on the De La Vergne Co., or a part of the De La Vergne Company's contractual undertaking to increase its capital. On the contrary, it is left entirely optional with that company whether to increase its capital or to pay the consideration provided for by the contract in money.

That it was never intended that the De La Vergne Company should be understood as *agreeing* to in-

crease its capital stock for the purpose of carrying out this particular contract, is also made apparent by the testimony taken in its own behalf, which establishes that prior to the beginning of negotiations with these plaintiffs the stockholders of that company were already arranging for an increase of its stock. (Printed transcript, p. 191.)

And even if the De La Vergne corporation *had agreed to increase its stock* and to pay plaintiffs in stock of such increased issue, that would afford it no defense to these proceedings; for, if it could not be forced to pay in the precise manner agreed upon, it could still be compelled to do so in another form.

This point is squarely passed upon by this court in the case of *Hitchcock v. Galveston*, *86 U. S.*, *51*. In that case the City of Galveston had agreed to pay Hitchcock for certain street improvement work in bonds to be issued by it for that purpose. It appeared that the city had no power to issue such bonds. *Held*, however, that though the contract in that regard was in excess of the municipal corporation's authority, that fact would not relieve it from making compensation to the plaintiff in money. This court said:

"The promise to give bonds to plaintiffs in payment for what they undertook to do, was, therefore, at farthest only *ultra vires*, and in such case, though specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation can be held liable on its contract. Having received benefits at the expense of the other contracting party it cannot object that it

was not empowered to perform what it promised in the mode in which it promised to perform."

To the same effect:

Fort Worth City Co. v. Smith Bridge Co. 151 U. S., 294;
State Board v. Railway Co., 47 Ind., 407;
Parish v. Wheeler, 27 La. Ann., 449.

And so the rule is stated to be in *Morawetz*, Sec. 86, that even where the contract of the corporation will not be specifically enforced because *ultra vires*, the corporation will nevertheless be liable in money damages where the contract has been performed by the other side.

Since, however, the De La Vergne Co. *did not engage* to increase its capital stock, further discussion of this legal proposition is unnecessary.

III.

It was also contended, and probably will again be contended, that if the contract in question be considered as a sale of the assets and good-will of the Consolidated Co., and not as a sale of its stock, then it was *ultra vires* the Consolidated Co.

In the Court of Appeals counsel admitted that a corporation finding its business no longer profitable, or desiring for any other reason to discontinue its business, may sell or dispose of its assets in lump as well as in parcels; but they argue that the courts have felt compelled in recent years to put their stamp of disapproval upon the legalization of the "*modern*

trust." Thereupon counsel having assumed that they were dealing with a case of modern trust, or the creation of a monopoly or pool, cited a large number of cases in support of the proposition advanced by them.

Conceding the correctness of their assertion we deny its application to the facts before the court. For a moment, however, we consider the cases to which they made reference in the court below.

People v. Chicago Gas Trust Co., 130 Ill. 268, was a case where a consolidation had been attempted between companies engaged in an employment or business of a *public character*. The court after a review of the facts before it held that they warranted the conclusion that the attempted consolidation was for the purpose of creating a *monopoly*.

The case of *Central R. R. Co. v. Collins*, 40 Ga. 582, involved a combination between railroads, engaged of course in a *quasi-public business*. Again the court's condemnation was placed upon the ground that the nature of the business in which the two corporations were engaged was of a public character, and again there was a case of attempted coalition, and not a case of purchase or sale.

In *Bishop v. American Preservers Co.* 157 Ill. 284, the court had before it an agreement which provided for the consolidation of *all the interests* engaged in a certain business into "*one giant combination*.

In *People v. Ballard*, 32 N. E., 54, the court held a sale by a domestic company to a foreign corporation, *organized through its preagreement with*

a number of non-resident trustees for the express purpose of stepping into its shoes, taking all its assets and carrying on its business, invalid as to non-assenting stockholders and the State; and held that the latter, the State, might compel the trustee who consummated the transfer to make restitution of the property to the corporation.

These cases sufficiently show the nature of the authorities which plaintiff in error relied upon in support of the contention that the contract in question was *ultra vires* and void as against public policy.

But what is there in the record in this case to indicate that the Consolidated Co, and the De La Vergne Co. were the only manufacturing corporations engaged in the building and selling of refrigerating machines, or that after insolvent proceedings by the Consolidated Co., and after that company had practically abandoned business, a sale by plaintiffs of whatever equity they yet had in the distribution of any surplus of the assets remaining after payment of their company's debts, would create a trust or monopoly? There is nothing to suggest that the price of refrigerating machinery would have advanced a penny or that the De La Vergne Co. would, after such purchase, have been in position to control that particular line of industry. On the contrary, it will be readily accepted as a fact, within common information, that in almost every manufacturing city and town in the country such machinery was then and now is being manufactured.

Referring again to *Morawetz*, we find that the author at Section 212 states the following as the rule upon this subject, deduced from the authorities cited in support thereof:

"But a corporation may sell out its assets and receive in payment *stock in another company*, having a fixed money value and convertible into cash at any time. The stock received under these circumstances is taken in lieu of money. It may be distributed in specie among those shareholders who are willing to accept it, but should be converted into cash and the proceeds distributed among those who do not consent to the arrangement."

In the case at bar every stockholder of the Consolidated Company had consented to just such an arrangement.

And so on the other hand, *Morawetz* says, at section 218:

"The question of whether or not a corporation may purchase the whole concern of another company, depends upon the circumstances of the case. A corporation may purchase from another company as well as from an individual; and it may make the best bargain it can in order to obtain any property which is required for the purposes authorized by its charter. If, then, one company should desire to sell all of its fixtures and stock in trade, and another company should have a legitimate use for substantially the same property in carrying on its own business, the latter would be entitled to purchase the whole concern of the former.

"Under these circumstances it would not be an objection to the transaction that a portion of the property was not required by the purchasing company in carrying on its regular business, if the bulk of the property was purchased in good faith for authorized purposes and the remainder merely as a means of effecting an advantageous bargain.

"And there is no reason why the purchasing company should not pay for the property so obtained by assuming certain debts of the selling company instead of paying in cash."

On the question of what constitutes a *trust* or *monopoly* the Supreme Court of California recently, in *Herriman* v. *Menzies*, 115 Cal., 16, said: "A monopoly exists where all or nearly all of the article of trade or commerce within a community or district is brought within the hands of one man, or set of men, so as to practically bring the handling or production of the commodity or thing within such single control, to the exclusion of competition or free traffic therein, and anything else than this is not a monopoly. * * * An agreement, the purpose or effect of which is to create a monopoly is unlawful if it relates to some staple commodity or thing of general requirement or necessity, and not to something of mere luxury or convenience."

What is there, we ask, which would bring within the condemnation of the courts a purchase by one company, engaged in the manufacture of refrigerating machines, of all the assets and good-will of another? Granting that the purpose in the case at bar was to dispose of the rivalry and competition of the

Consolidated Company, does this create a trust or monopoly any more than if one grocer in a large community purchase the assets and good-will of his strongest competitor?

In conclusion and in connection with this point we add, in the language of the Supreme Court of Illinois, in *Bradley* v. *Ballard*, 55 Ill., 413: "When the contract is *executed* the doctrine of estoppel is applied for the purpose of compelling corporations to be honest in the simplest and commonest sense of honesty, after whatever mischief may belong to the performance of the *ultra vires* act has been accomplished."

Also in the language used by this court in the case of *Union National Bank v. Matthews*, 98 U. S., 621, quoting with approval the following citation from Sedg. on Stat. & Const. Constr., 73, to-wit: "Where it is a simple question of authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted in an action founded upon it, to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract, the benefit of which he retains."

To the same effect:

Whitney Arms Co. v. Barlow, 63 N. Y., 62.

Oil Creek Co. v. Pa. Transportation Co., 83 Pa. St., 160.

Gasquet v. Carson City Brewing Co., 49 F. R., 496.

Camden Co. v. May's Landing Ry. Co., 48 N. J. L., 567.
Morawetz, Sec. 689.

For these reasons it is respectfully submitted that the defendant corporation should not be permitted to plead that it exceeded its charter power, in acquiring the assets of the Consolidated Co. or that the Consolidated Co. exceeded its powers in disposing of the same; for whatever mischief the making of such a contract might produce, has been produced and cannot longer be prevented; though it is not apparent that any could have resulted or did result.

We also note in this connection a suggestion made in the court below by opposing counsel, that the contract in question was void because violative of a statute of New York passed during the legislative session of 1890, prohibiting *combinations* between corporations for the purpose of stifling competition.

With respect to this point it is sufficient to say that the Act referred to did not go into effect until May 1st, 1891, whereas the contract in question was made on April 16th preceding, in good faith, for a legitimate business purpose, and not in anticipation of the Act.

IV.

It was also argued that the De La Vergne Co. never authorized its president and principal stockholder to execute the contract in question and that it never ratified the same.

As opposed to that contention we refer:

1. To the fact that the answers in these cases, denying such execution, are not verified, and that thereby such execution of the contract stands admitted.

R. S. Mo., 1889, Sec. 2186.

And a failure to verify such answers does not admit merely the *formal* or *clerical* execution of the contract, but admits its *substantial* execution.

Rothschild v. Frensdorf, 21 Mo. App., 318.
Smith Co. v. Rembaugh, 21 Mo. App., 390.
Lithographing Co. v. Obert, 54 Mo. App., 240, (246).

2. The depositions offered by defendants, independently of defendant corporation's failure to put the execution of the contract in issue by verification, failed to establish that defense.

On the contrary, the testimony of the witnesses establishes that the experts, Guernsey and Waters, were paid for their investigations of the Consolidated Company's affairs by the *defendant corporation;* that they duly sent in itemized accounts setting forth in a general way the work performed and outlays incurred; which accounts, duly receipted, were on file among the defendant company's vouchers and papers, and the company's books showed these accounts as expended by it. (Printed transcript, pp. 304-305, 315-320.)

There was also produced and annexed to the depositions as exhibits, a mass of correspondence between Robert E. Jenkins, assignee, and the defen-

dant De La Vergne, *as president*, in relation to this matter; also the admissions of at least two of the De La Vergne Company's trustees or directors, that they became acquainted with the fact of the making of the contract shortly after its execution and of the payments made to Waters and Guernsey, and that they raised no objections thereto, except that one of them complained of the *amounts* charged by one of the experts for his services.

And there was the further evidence that on May 1, 1891, therefore within five days after the certificates of the Consolidated Co. stock had been delivered, a contract was entered into between the De La Vergne Co. and one Koenigsberg, a former salesman and Secretary of the Consolidated Co., whereby he agreed to serve *the De La Vergne Co.*, for a period of three years in connection with the sale of machines of the Consolidated type or pattern, and agreed to serve *the De La Vergne Co. or the Consolidated Co. "as he might be directed to do."* (Printed transcript, p. 284).

There was also evidence to the effect that this contract *was kept a secret* until after the defendants had repudiated liability to plaintiffs in September, and that then there appeared, *at the expense of the De La Vergne Co.*, advertisements in Koenigsberg's name in connection with the Consolidated machines; also that Koenigsberg retained the former New York branch office of the Consolidated Co., the De La Vergne Co., paying not only the office rent but paying all expenses incurred in Koenigberg's ostensiable business. There were other details, all tending

to show further connection of the De La Vergne Co. with the contract, which it is unnecesary to set forth minutely. It is sufficient to say that the New York depositions, read by defendants, confirmed what the Court of Appeals said on the first appeal: "The defendants had undoubtedly then (September 12, 1891), derived all the benefits of the performance of the contract of the Consolidated Co. and its stockholders that they could ever derive. They still held the rights to its assets, subject to its debts, the goodwill of its business, and the covenant of its stockholders which suppressed its competition. *No doubt they secured its customers* and destroyed all possible competition. The return to the stockholders of the control over the empty shell of their corporation would have been a useless act."

3. The agreed statement of facts was entered into years ago when the matters of fact were still fresh in the minds of the parties, and this agreed statement sets forth in unambiguous language that the defendant company entered into the contract in question. At page 39 of the printed transcript (42 of the manuscript) appears the following admission: "That on the 16th day of April, 1891, the defendants De La Vergne and the De La Vergne Refrigerating Machine Co. and said Consolidated Ice Machine Co. and said several plaintiffs, *did enter into a contract in writing, of which the following is a copy:*" whereupon follows the contract thus admitted to have been executed by defendant company.

Thus the corporation's execution of the contract

stands admitted in solemn form; and the depositions not having established any violation of the contract on the part of the plaintiffs, and the court below having specifically so found, and the depositions having failed to show an abandonment of the contract, and the court below having specifically so found, the case rests again as it did in the beginning, upon the facts set forth in the agreed statement and upon none other.

V.

Plaintiffs have always contended that they sold, and that defendants bought, whatever right or interest plaintiffs and their corporation had in the assets of the Consolidated Co., and in its good will and trade after payment of its debts; and that for this and for the covenant of plaintiffs, defendants agreed to pay them the stipulated sum of one hundred thousand dollars. Defendants on the other hand contend that what they bought was *stock*, and that this stock was not merely "*thrown in*" with the assets as a further assurance of title, and that therefore the contract was *ultra vires* the De La Vergne Co. Assuming for the moment that if the stock was *the* consideration that the contract was void (which proposition, however, we deny), yet it is a familiar canon of construction that if an agreement is susceptible of two interpretations, one of which makes it legal and the other of which makes it illegal, that one will be adopted which upholds rather than destroys the contract.

Shove v. Wilson, 9 Clark & F., 397.

Noonan v. Bradley, 9 Wall, 394 (407).
Ormes v. Deuchy, 82 N. Y., 443.
And the many other authorities cited in the brief under Point V.

The interpretation given by us to the contract has been given it also by the Circuit Court and by the Court of Appeals. It is therefore fairly, if not conclusively, open to that interpretation of its meaning and purpose. Under the doctrine of the foregoing authorities that meaning should prevail rather than the one insisted upon by the defendants, which would destroy its legal effect.

VI.

The executors of the Jungenfeld estate had such title in the stock belonging to their decedent that their assignment of it passed title to defendants, if we view the case on the theory that the stock was the subject of the transaction.

It is well settled that the legal title to personal property of a deceased vests at common law in his legal representative, and that such representative is unrestricted in his right to dispose of the same to a purchaser in good faith.

In *Woerner on American Law of Administration*, at Section 331, the authorities are collected and the rule deduced from them is announced as follows:

"Since the legal title to all personal property descends to the executor or administrator, a sale or conveyance by him passes a good title to the vendee

and to the assignee and vendee of negotiable notes. If the executor misapply the assets he commits a *devastavit*, and creditors, heirs and legatees must look to him personally and to his sureties for indemnity."

And at Section 175 the same author says:

"But an executor or administrator has at common law power to dispose of and alien the assets of the decedent; *he has absolute power over them for this purpose*, and they cannot be followed by the creditors of the deceased. And he may convert them to his own use, thus making himself chargeable with the amount, and subjecting those converted to the same incidents and liabilities as if they had never belonged to the estate of the deceased."

This question arose early in Missouri, where the executors in question were appointed and acted, in the case of *Downing v. Garner*, 1 Mo., 749, (p. 537 of reprint). The dispute there arose between the transferee of a slave from an administrator and the purchaser under a writ of execution against the administrator. The Supreme Court of Missouri disposes of the question as follows:

"Very many points have been raised which need not be particularly noticed. Those which go to the merits of the action are: First. *Have administrators the right or power to sell or dispose of the personal assets of the intestate so as to pass the title* to purchasers, distributees, etc., clear of the claims of creditors, etc.? * * * As to the first point, the claims or demands of creditors, distributees and residuary legatees are personally against executors

or administrators, and if they misapply the assets, *over which they have an absolute power of alienation*, they commit a *devastavit* for which their own property and that of their sureties is responsible. See *Cook's Report*, 205-6; Bay's Report, 321; Taller's Laws of Executors, 239-41-44."

It is true that many of the States of the Union have modified the common law rule by legislative enactments upon the subject of administration. In some the effect has been to deprive executors and administrators altogether of the right of making disposition of the property coming to their hands, while in others the effect of the statutory provisions has been to leave the administrator still free to dispose of the *personalty* coming to him, without an order of court, but to hold him liable in such case for its fullest value, as at common law. In other words, he may seek the advice of the court by obtaining an order of sale and be protected thereby against personal responsibility.

Thus in *Makepeace v. Moore*, 10 Ill. (5 Gilm.), 474, the court, speaking of the power of an administrator to sell without leave of court, says:

"If he disposes of the note without the direction of the court to do so, he is chargeable with the amount due upon it; if he acts under the sanction of the court he is only to be charged with the amount he actually received."

The same rule was made in:

Walker v. Craig, 18 Ill., 116.

Thornton v. Mehring, 117 Ill., 55.

And even in those States where it has been held that statutory provisions are intended to cut off the right of the legal representative to sell personal property excepting upon an order of court, it has also been held that a sale without such order *is not void* but only voidable. Such is the decision of the Court of Appeals in Missouri in the case of *Boeger v. Langenberg*, 42 Mo. App., 7 (p. 13), where it is said:

"But such a sale or pledge is perhaps only *voidable* and would be treated as valid until called in question by the creditors, next of kin, or other persons interested in the estate."

In North Carolina an Administration Act has prevailed for many years quite similar to that prevailing in Missouri. The Act provides that personal property of a deceased should be sold at public auction, after public advertisement, and upon an order of the county court for that purpose *first having been obtained*. Certain executors disposed of personal assets *at private sale and without an order of court*. The title of the purchaser being attacked by one of the distributees in the case of *Wynns* v. *Alexander*, 2 Dev. and Battle's Eq. Rep., 58, the court passing upon the question said:

"The executor or administrator might, before the passage of the Act, have sold *bona fide* the goods and chattels of the testator or intestate; the legal title was in him and an honest purchaser from him would also have acquired a good title. The common law on this subject is not repealed by this Act. The statute is only directory, which, however, it would

be well always to follow: for if the executor or administrator fails to obtain as much at private sale as would have been got at public vendue he would be bound to make good the deficiency out of his own pocket."

So also in Vermont, in *Mead* v. *Byington*, 10 Vt. 116, where admistrators sold personalty at private sale, without an order of court, for less than its appraised value, the Supreme Court says:

"The administrator is entitled to an order of the Probate Court to sell at public or private sale, yet we do not think such an order indispensable to his protection against losses if he acts with due judgment and discretion and in good faith. If he so acts it must be indifferent to the estate whether he sells at private sale, with or without the order for that purpose."

And accordingly, on exceptions to their settlement, the administrators were allowed credit in their accounting for the difference between the appraised value of the property and the proceeds realized, notwithstanding they had acted without an order.

In South Carolina the statute provided "that when it should be requisite to make sale of the intestate's personal estate for the payment of debts, for a division, or to prevent the loss of perishable articles, application shall be made to the court of the county, or ordinary, *for an order of sale;* whereupon the court or ordinary may grant or refuse such order."

In *Harth v Huddlestone*, 2 Bay's Rep., 321, an

action *in trover*, wherein defendant claimed title under a bill of sale from the administrator who had sold the property in controversy to him, *without an order of sale*, it was held that there was nothing in the "*Executors Law*" which took from the administrator the power to dispose of goods and chattels, at his peril in case of loss.

In *Dickson v. Crawley* (1893), 112 N. C., 629, a private sale by an administrator without an order of court was held to pass title, the court saying:

"A private sale of a chose in action by an executor or administrator, if made in good faith, is valid, although, says Daniel, J., it would be well to follow the direction of the statute; for, if the executor or administrator fails to obtain as much at private sale as he would have got at public vendue, he or they would be bound to make good the deficiency out of their own pockets."

SCHOULER, in his work on *Executors and Administrators* (2 Ed.), 346, announces his conclusions on this subject as follows:

"Personal property of the deceased, notwithstanding such statutes, is commonly sold by executors or administrators at their own discretion without any order of court; and if the representative acts in good faith and sound discretion the interests of no person concerned can be injuriously affected. * * * The executor or administrator, however, makes a sale at his own risk where such an order is not previously obtained; and the advantage of procuring one is apparent, where it is probable the

property cannot be sold for its appraised value and the administration may be greatly affected by the amount realized; for, complying with the terms of his order the executor's or administrator's responsibility is limited to duly accounting for the proceeds of the sale."

Upon these authorities it is submitted that viewing the transaction as a sale of stock the assignment by the executors of the deceased Jungenfeld was sufficient to pass title to defendants.

In the court below counsel for defendants cited certain Missouri cases apparently, but only apparently, in conflict with the foregoing; but on an examination of those cases it will be found, if they are cited here, that they relate wholly to transfers of negotiable paper; with respect to which an exception to the rule prevails in Missouri. And those cases are based upon the peculiar language of a local statute, touching the transfer of *bonds and notes*, are in conflict with the authorities elsewhere, and cannot properly be held to apply to other property.

VII.

But without any resort to the law to ascertain the ordinary legal rights and powers of legal representatives, the transfer and assignment of the stock by the executors vested good title in defendants, because in the will nominating them they are expressly given "*full power to sell, convey and transfer any part or portion of my estate, if they deem it for the advantage of those interested as legatees.*"

Under this power, and independently of any authority conferred by the general law, defendants became vested with a good title to the Jungenfeld stock by virtue of the assignment thereof by the executors. Thus, if the transaction be viewed as a stock transaction, defendants cannot contend on meritorious grounds that they did not become well vested with the title to the particular shares under discussion.

VIII.

But, contended defendants in the courts below, even though executors may sell and convey the title of the decedent in shares of stock, yet they possess no such authority with respect to shares in a corporation organized under the laws of a foreign state.

In this contention, however, we submit they are in error. The precise question is exhaustively considered and discussed in the case of *Middlebrook v. Merchant's Bank*, 41 Barb. (N. Y.), 481.

The facts there were that one Robbert Middlebrook died in Connecticut, the owner of one hundred shares of stock in the Merchants' Bank of New York. Administration was had on his estate in Bridgeport, Connecticut, and the executors there appointed assigned fifty of the shares to plaintiff. When plaintiff presented his certificate and offered to surrender it for one to be issued to himself, the officers of the bank refused to recognize his right thereto, taking the ground that the foreign executors could pass no title to the stock. Plaintiff there-

upon brought suit to compel such transfer, and the Supreme Court, in determining the case, said:

"The ground upon which the bank refused to permit the transfer to the plaintiff and the ground upon which the counsel of the bank upon the argument insisted it was justified in so refusing, was substantially that the bank was not obliged to recognize the title of the foreign executor. In this I think that the bank and its counsel were mistaken. The cases in this State only show, I think, that our courts will not recognize the rights of a foreign executor or administrator *to sue* in the courts of this State, under or by virtue of his foreign letters testamentary or of administration. I suppose there is no reasonable ground for saying that the title to the testator's bank stock in this State, as well as to all his chattels and personal estate, wherever situated or being, vested in his executors, either by the will on his death or issuing of letters testamentary to them, or both. *Having title to the bank stock in question they had a right to asssign it to the plaintiff and to execute the power of attorney authorizing the transfer to him.* I do not know that it has ever been questioned but that even a foreign statutory bankrupt proceeding passed the title to the bankrupt's property here as between the bankrupt and his assignees. The cases in this State only go to show, I think, that the plaintiff's assignors, as Connecticut executors, could not have maintained an action against the bank for refusing to permit them to transfer the shares. Perhaps you may say that the bank was not legally bound to permit the transfer on the demand of the executors *before the assignment to the plaintiff*, be-

cause the executors could not, as foreign executors, bring an action for such refusal in their own names as such executors; but if the executors could and did execute the power of attorney for its transfer on the transfer books, the bank, I think, was bound to recognize the plaintiff's title to the stock, and *his* right to have it transferred to him on the books; and for refusing to permit such transfer I think the bank is liable in this action brought in the name of the assignee of the executors. It is utterly immaterial whether the assignment to the plaintiff and the power of attorney for the transfer of the stock were executed in Connecticut or in this State."

From this judgment so rendered against it the bank appealed, and the case coming before the New York Court of Appeals, was there affirmed; the court stating their views (*Middlebrook v. Merchants' Bank*, 3 Abb. App. Dec., 295), as follows:

"By the law of the testator's domicile his executors succeeded to the ownership of his personal property. Under an authority derived from him, and in the exercise of a *jus disponnendi* inherent in them as successors to his title, they transferred the stock to the plaintiff. He produced to the bank the appropriate evidence of his interest and requested permission to enter the transfer on its books on the surrender of the original certificate. *His right as owner was perfect, and his demand was wrongfully refused.* There was no occasion for taking out letters testamentary here, for either *the passing of title to the stock, or of satisfying the scruples of defendants.*"

The same question came before the Supreme Court of New Hampshire, which, in the case of *Luce v. R. R. Co.*, 63 N. H., 588, announced the following views:

"Letters of administration confer no extra territorial authority as matter of right; hence the power of an executor or administrator is limited to the State or country of his appointment, and being so limited the general law is that he cannot sue or defend in his representative capacity in a foreign jurisdiction—*not, however, for want of title to the assets of his decedent situated in such foreign jurisdiction*, but because of his personal incapacity to enforce it. And it is upon this ground of title that it has been so often decided by courts of the highest authority, that, in the absence of ancillary administration or statutory prohibition, the domiciliary administrator or executor has authority to take possession of and remove the goods or effects of the decedent in another jurisdiction, or to collect a debt due from a debtor residing therein if voluntarily given up or paid, and give a good acquittance and discharge therefor. *Soo, too, he may sell and assign stock in a foreign corporation*, and the corporation may voluntarily consent to its transfer by accepting the outstanding certificate and issuing a new one to the purchaser. *Hutchins v. State Bank*, 12 Met., 421, 426, 427."

It is therefore apparent that the objections urged by defendants, namely, that Jungenfeld's executors could not transfer title to the Consolidated Company's stock, because that company existed under incorporation in Illinois, is devoid of any merit.

IX.

Jungenfeld's will also conferred upon the trustees of his minor son power to sell the interest of the latter in the stock of the Consolidated Co. The will provides that the trustees shall "*manage, control and invest*" the minor's estate. This language is sufficiently broad and comprehensive to clothe them with the power of disposition. Such power need not be conferred by express words, but will be implied, if it be manifest that such was the intention of the testator.

18 Amer. & Eng. Enc., "Powers," 901, and cases there collected.
Danish v. Disbrow, 51 Tex., 235.
Orr v. O'Brien, 55 Tex., 149.

X.

But whether the executors or trustees had power to sell, or had no such power, becomes wholly immaterial when we consider that defendants were dealing with persons occupying a trust relation to the stock. Defendants knew they were purchasing from trustees, whether their purchase consisted of assets or consisted of stock, and it is an elementary rule that persons dealing with trustees are put upon their inquiry. They are bound to ascertain and to know the extent of the trustee's power. No implied warranty of title or of power exists in such cases.

"There is no presumption that a trustee has the

right to sell corporate stock like an executor. One dealing with him is put on inquiry."

Duncan v. *Jandon*, 82 U. S. (15 Wall.) 165.

"Purchasers from trustees are themselves bound to see that the sale is not a breach of trust or that some act done in the course of it will not prevent them from enforcing the contract."

Godefroi's Law of Trusts, 360.

"Notice of the extent of the trust is by all the authorities held to impose the duty of inquiry as to its character and limitations, and whatever is sufficient to put a person of ordinary prudence upon inquiry is constructive notice of everything to which that inquiry might have led."

Shaw v. *Spencer*, 100 Mass., 382.

"The party taking stock on pledge from such a trustee deals with it at his peril, for there is no presumption of a right to sell it as there is in the case of an executor."

Wood's Appeal, Pa. St., 79.

The case of *Mason* v. *Wait*, 5 Ill. 127, (135,) a suit upon a promissory note, is quite to the point. Among other defenses it was pleaded that the note was given on a purchase of certain land from plaintiff as the guardian of her minor child, and that plaintiff had no power to make the sale. The court overruled this plea, saying:

"The seventh plea relies upon a *suppressio veri* as a defense. The basis of this defense is fraud, and while the plea attributes a knowledge of the want of power to the plaintiff, and a concealment of it,

yet it does not appear that the plaintiff pretended to sell in any other right than as guardian, nor that she pretended to have any other title than that of the ward. There are no false representations alleged. The power and appointment of a guardian are matters of law and of record, which those dealing with them may and should inquire into, and, I think, are bound to notice to the extent to which the doctrine of *caveat emptor* should apply with us. The appointment is recorded in the Probate Court; the powers are such as the law confers. This much the defendant should examine. *If she pretends to go beyond this they should call for her authority. If they deal without it, I think they ought to be concluded by their own negligence.*"

Such was also the view of the Court of Appeals in these cases:

"If it is said that the defendants were not aware that the assignments made by the executors and trustees were not authorized by orders of the Probate Court, and hence that they were excused from rejecting them and returning the property which they had received, the answer is that it was as easy for them to ascertain that fact in May and June of 1891, when these parties could have been placed *in statu quo*, as it was on April 10, 1893, after they had derived all the benefits of the contract, when they first raised the point by their answers in this case.

Moreover, the rule *caveat emptor* governs them. They knew the law. They had notice of all the facts that the diligent inquiry of a reasonably prudent man

would have discovered, and they had reserved to themselves by the contract sixty days after the assignments were delivered to examine them and decide upon their sufficiency before they were required to pay."

German Savings Institution v. De La Vergne Refrigerating Machine Co., 36 U. S., App., 184.

In the case at bar, defendants voluntarily chose to contract with Messrs. Rassieur and Lingenfelder, in their capacity of executors and trustees. They joined with the corporation in which they held stock in such representative capacity in disposing of whatever right, title or interest they could convey. They are described in the instrument as executors and as trustees and they signed in that character. The assignment on the back of the certificates of stock is likewise so signed. Clearly, then, under the authorities it was for the defendants to ascertain the extent of the power of these executors and trustees and to determine whether they would negotiate or deal with them. It was their duty, too, to make these inquiries before executing the contract and accepting the stock and to determine whether they would acquire anything by the conveyance, and not afterwards.

It must be now assumed that defendants did make such inquiries and concluded to accept the conveyance for whatever it might be worth. After having received and retained such rights as these trust representatives could convey, it does not lie in the mouths of defendants to now assert that they lacked the power of making conveyance. And it may fairly

be urged that defendants having made every investigation that it was their duty to make, and having ascertained just how extensive or how limited were the powers of the trustees, were willing to take their chances on the legal effect of their act. They certainly got all for which they bargained, the stock certificates of the Jungenfeld estate and of the Jungenfeld minor, properly assigned by the executors in the one case, and by the trustees in the other.

In the language of Judge WOERNER, in his work on *Administration*, at page 1077: "The principle of *caveat emptor* is therefore strictly applicable. The obligation it imposes upon the purchaser is that he must exercise his own judgment upon what he can reasonably exercise it pertaining to the thing sold. Hence in sales by executors and administrators there is no warranty, express or implied."

XI.

Defendants have heretofore also urged that no transfer of the stock was made because some of the certificates were merely assigned in blank, and because the contract speaks of *stock* and not of stock certificates. We submit that this argument is ill-founded.

An agreement to transfer or assign stock in a corporation is sufficiently performed by delivery or offer of certificates therefor assigned in blank.

23 Am. & Eng. Enc. "*Stock*," p. 685, and authorities there collated.

Keller v. Eureka Brick Mfg. Co., 43 Mo. App., 84.

Besides, it does not appear that any such objection was made when the certificates were delivered. On the contrary, the certificates of stock so assigned in blank were retained and have been retained ever since. They have been produced in court, but only as exhibits on behalf of defendants and are subject to withdrawal by them.

XII.

The argument was also advanced by defendants, and it may be renewed here, that plaintiffs had nothing of interest in the assets of the Consolidated Co. after its assignment for the benefit of creditors, whether legal or equitable, which they could convey. And upon this premise defendants argued that nothing passed to them by the conveyance embraced within the contract.

The assertion cannot avail defendants because all of the facts were known to them at the time and are set forth, not once but repeatedly in the agreement itself. There was no concealment of the true state of affairs, nor any attempt to magnify the assets, which were the subject of the transaction. That the Consolidated Company's tangible property was in the hands of an assignee was well known, for defendants expressly purchased the same *subject to the payments of the debts of the Consolidated Company and subject to the legal custody of the same in the hands of the assignee, as the representative of the creditors.*

That these assets, without any regard to the goodwill, and without any regard to the covenant of the

plaintiffs set forth in the contract, had a value in excess of the obligations of the company must necessarily be assumed; for the record discloses that before defendants entered into the contract and made the purchase, they made the most painstaking investigations and examinations into the condition of the Consolidated Company's affairs, employing expensive experts for that purpose. But if the value of the assets was purely speculative, and not real, that fact was as well known to defendants on the 16th of April, 1891, as at any time since. Whatever they bargained for they have received, so far as they cared to receive it. If they were content with the trade and good-will of the Consolidated Company, which they secured (but which fact they attempted to conceal), and with the covenant they had received from the plaintiffs, whereby they were precluded from reentering into the field of business for ten years, and were willing to let go the manufacturing plant, machinery and other tangible property, rather than liberate the same from the assignee by paying the Consolidated Company's debts, or by compromising with the creditors and thus making the assets still more valuable to themselves, that was their own affair; and for their failure to fully realize on their contract, as it was in their power to do, the plaintiffs should not be made to suffer. They fully conveyed and transferred to defendants all that they agreed they would, and they fully and faithfully in every other respect performed their contract. Defendants should be compelled to perform it on their part.

The contention that by the assignment the title to the property passed to the assignee and that there-

fore nothing was left in the corporation or its stockholders to convey, is, to a certain extent, but only to a certain extent, true; but defendants are bound to admit that under the laws of Illinois this property could have been re-acquired from the assignee in exactly the manner set forth in the contract. Manifestly when defendants made the purchase they intended by an acquisition of the claims of creditors, by purchase on favorable terms or by payment when no other terms were open, to secure such reconveyance of the assets from the assignee. Their failure to do this is a matter over which plaintiffs had no control.

In this connection defendants also maintained that the effect of the agreement under discussion was an attempt by plaintiffs to sell the assets of their corporation and to leave the creditors unprovided for and unpaid. The agreement itself contradicts such an assertion. The agreement provides that the sale is subject to the rights of creditors. And it was only the surplus, which might remain after every obligation was extinguished, that was to be divided up amongst the plaintiffs as the sole owners of stock of their company, in the proportions in which they held the same. This they had the lawful right to do, because in such surplus no one was interested but themselves. The effect of that part of the agreement was to wind up the Consolidated Co. and to make the shares of stock, as stock, wholly valueless; and of this fact defendants were necessarily aware by the terms of the agreement itself.

XIII.

Notwithstanding the findings of the Circuit Court defendants insisted in the Court of Appeals that the record showed a violation by plaintiffs of their covenant to refrain for ten years from re-entering the business of making or vending refrigerating machines, and also that the record showed an abandonment of the contract.

Both contentions were determined adversely to defendants in the special finding of facts made at their request.

It is well established practice that where a case is tried, as was this consolidated cause, by the court without a jury, its findings upon questions of fact are conclusive in the federal appellate courts.

Stanley v. *Albany Co.*, 121 U. S. 535;
Allen v. *St. L. Natl. Bank*, 120 U. S. 20;
Bridge Co. v. *R. R. Co.*, 92 U. S. 315.

And when a court to which the cause has been so submitted has found the facts specifically the only question open *upon a writ of error is the sufficiency of the facts found to support the judgment.* The Appellate Court will not inquire whether the *evidence* was sufficient to support the *findings.*

Wile v. *Farmers State Bank*, 17 C. C. A., 25; s. c. 70 F. R. 138;
Minchen v. *Hart*, 18 C. C. A. 570; s. c. 72, F. R. 294;
Woodbury v. *Shawneetown*, 20 C. C. A. 400; s. c. 74 F. R. 205.

Nor is any error in findings of fact subject to revision if there was *any* evidence upon which such findings could be made.

Hathaway v. *Bank*, 134 U. S., 494.

The mere statement of these propositions is sufficient to show their application to the case at bar, and the evident impropriety of the endeavor of counsel to have this court review the facts as a trial court.

In this connection counsel also argued, and may argue again, that the court below erred in failing to make certain findings requested by them. A mere glance at the findings so requested (printed transcript, p. 348 et seq.) will show that they were not findings of ultimate or final facts but a mere recital or rehearsal of evidential facts from which certain conclusions could be reached.

We submit that the court below properly declined to find the facts in that sense which would have required it to set out the *evidence* in the case.

"The refusal of the trial court to find the immaterial or incidental facts amounting only to evidence bearing on the ultimate facts found, is not a proper subject of review."

Hathaway v. Bank, 134 U. S. 494.

"A special finding of facts by the court need only state the *ultimate facts*, not the evidence."

Mining Co. v. Taylor, 100 U. S. 37.

These ultimate findings the court made, and this is all which defendants could justly demand.

Therefore, we repeat, it is unavailing for defendants to claim on appeal that plaintiffs are not entitled to recover because of the assertion made by them, and found to be untrue by the court below, that certain of the plaintiffs had violated their covenant, or that all of the plaintiffs had acquiesced in an abandonment of the contract.

And if this court were disposed to examine the record it would find that the trial court's conclusions were the only conclusions which could be reached from a consideration thereof.

XIV.

It was also claimed that the trial court erred in refusing to pass upon or to declare ten abstract propositions of law prayed for by plaintiff in error. (Printed transcript, p. 383.)

We sufficiently anticipate this objection, if again made, by merely referring to the case of *Mercantile Mutual Ins. Co. v. Folsom*, 18 Wall. 237, wherein it is held that where a case is tried before the court, upon a waiver of jury, its refusal to grant abstract conclusions or declarations of law does not constitute error.

XV.

The contract in question having been executed by and on behalf of eight several interests it was claimed that it was thereby made joint and not several; that therefore the actions forming this consolidated cause were improperly brought; that there

should have been one joint cause instead of separate causes in favor of eight plaintiffs.

It appears from the petitions or declarations in these causes that the promise set forth in the contract is one which was made to the several plaintiffs separately, and this also appears from the contract itself. In other words, the contract contains the provision that defendants should, within sixty days after the receipt of the certificates representing the Consolidated Company's issued shares of stock, turn over, deliver and transfer to each of the plaintiffs respectively, a certain portion of the $100,000 of money or of stock in the De La Vergne Co., as the defendants may elect. While the contract was under one cover and in one writing it is apparent from its face that it was a several contract between the De La Vergne Co. and De La Vergne on the one hand and each of the eight plaintiffs on the other. The test stated by PARSONS, in his work on CONTRACTS (Book 1, * p. 19), for determining whether a contract of a number of persons is joint or several, is as follows:

"The nature, and especially the entireness of the consideration is of great importance in determining whether the promise be joint or several; for if it moves from many persons jointly the promise of payment is joint; but if from many persons and from each severally, then it is several."

In BLISS ON CODE PLEADINGS, at Section 63, the test is stated in the following language:

"The general rules are, first that a right given to two or more persons without words of severance,

creates a joint and not a several liability; but second, if a contract, though made with more than one, contains a stipulation to pay a certain sum to each, promisee individually, or to do an act for the benefit of each one, it creates a several right."

Applying these two rules to the cause before the court it is clear that the objection made is insufficient. While the petitions set forth that all of the stockholders of the Consolidated Company sold their right, title and interest in the assets of the company, they also set forth that they were to transfer their several certificates of stock in said company to the defendants, to place them in more complete control of said assets. Such being the case, the consideration moving from the plaintiffs was not entire. It moved from many persons, *but from each separately*, and hence the contract must be deemed to have been a several contract.

Again the contract shows that the defendant company promised plaintiffs a consideration, which by the language of the contract was to go to them severally in certain proportions. The contract, it is true, was made with more than one person, but the act to be done by the defendants was to be done for the benefit of each stockholder of the Consolidated Company, and hence the contract created a several and not a joint right.

The following cases all support this view and announce that where an agreement is made by several, but the consideration is to be divided between them, several actions will lie and a joint action would be improper.

Finney v. Brant, 19 Mo., 43,
Cross v. Williams, 72 Mo., 577,
Taylor v. Coons, (Wis.) 4 N. W., 123.

The contract in this case provides that $100,000.00 of stock, or that amount if payment be made in money, shall be issued to the parties of the second part (the Consolidated Company's stockholders, plaintiffs herein) "*respectively* in the following *proportions*." Does not this clearly indicate, in line with the authorities, an agreement with a number of persons, *but for the benefit of each?* Is the agreement to issue to each *by name* a *certain specified proportion of the stock*, not exactly the same, as if one person promised in the same writing to pay to each of many persons therein named a particular sum?

But whatever merit that objection might have had has been waived by the answers herein. The alleged defect appeared upon the face of the declarations, and if advantage was to be taken of the point under review, it should have been by demurrer and not otherwise.

XVI.

John C. De La Vergne, one of the original defendants, having died, and having left property in Missouri, the public administrator of the City of St. Louis, under the statutes of Missouri, took charge of De La Vergne's estate and was substituted as a party defendant in the place of the deceased, and the action was revived against him.

Defendant, the De La Vergne Refrigerating Machine Co., claimed that administra-

tion in Missouri was not warranted, De La Vergne having been a resident of New York, and that there should have been no revivor against his administrator. No such objection is made by the estate of the deceased. It might be sufficient to suggest that the De La Vergne Co. cannot raise this question in behalf of the administrator or those whom he represents. The continuance of the proceedings against the administrator cannot be of disadvantage to the De La Vergne Co., and therefore whether the act of the court in reviving the cause against De La Vergne's representative was proper or erroneous, no harm could or can result therefrom to the plaintiff in error.

The facts relating to this matter are that De La Vergne had deposited with one Adolphus Busch, a resident of the City of St. Louis, certain stocks belonging to him, and these certificates were in Busch's hands at the time of De La Vergne's death. It was this property upon which the public administrator was proceeding with ancillary administration. The claim made by the De La Vergne Co.'s counsel was that the certificates were not property in Missouri which could be subjected to administration, and the suggestion was made that if the causes were to be revived at all it should have been by citation upon De La Vergne's executors in New York. We are aware of no method by which foreign executors could have been compelled to appear in the Missouri district, and we submit that no error to the defending corporation was committed by the court's ruling.

In the brief below the suggestion was also made that one of the plaintiffs to this cause, Leo Rassieur, at that time judge of the Probate Court for the City of St. Louis, had *appointed* the public administrator to take charge of this estate with a view to securing his aid in this litigation.

At page 67 of the brief filed in said court counsel say:

"It is submitted that any action by a State court which permits such State court, the judge of which is at the time practicing in the Federal Court in the case in which he is pecuniarily interested, to *appoint* an administrator amenable to him in the State Court for his actions, who shall enter into the judge's litigation, where he is both client and attorney, and *consent* to the rendition of a judgment for over $126,000.00 against the estate of the deceased person, does not tend to the proper administration of justice."

This court will take judicial notice of the Statutes of Missouri. Those statutes, indeed the record in this case, (printed transcript, p. 52) show that the public administrator in Missouri is *an elective officer*, commissioned by the Governor; with his appointment the plaintiff Rassieur had absolutely nothing to do. The statement so made, that he *appointed* the admininistrator for the purposes of this case, was wholly unwarranted and uncalled for and we trust will not be repeated here; it was no more unwarranted, however, than the further statement that the administrator was appointed to *consent to a judgment* against the De La Vergne estate. Nothing in the

record bears out either assertion. After De La Vergne's demise, his death having been suggested, the administrator who had taken charge of his estate in the performance of his official duties, entered his appearance in the cause so revived in his name. He adopted the answer which had been filed for De La Vergne, by counsel who made the assertion of which we complain, and he consented to nothing upon the trial. He waived nothing and he admitted nothing, as the records will show.

The De La Vergne Co. also urged against an affirmance of this judgment that the trial court had erred in rendering judgment against the assets of John C. De La Vergne, deceased, in the hands of the Public Administrator of the City of St. Louis, who had taken charge of these Missouri assets. The record will disclose that when this question was raised it was by motion *of the De La Vergne Company* to dismiss as to the defendant administrator, on the ground, as already stated, that at the time of De La Vergne's death he had no property in Missouri subject to administration. And during the trial, when the plaintiffs offered evidence against the administrator, showing his election, qualification, that he had taken charge of De La Vergne's estate, etc., *the De La Vergne Company* again objected on the same grounds.

The administrator did not sue out any writ of error, and the only appealing party and the only complaining party is the De La Vergne Company.

In the Court of Appeals said company, for the first time, raised the objection that the action should not

have been *revived at all* against De La Vergne's representative, but should have been proceeded with against the De La Vergne Company alone. This contention it based upon Sections 955 and 956 of the U. S. Revised Statutes.

In Missouri all actions are revivable in favor of, or against the representatives of a deceased plaintiff or defendant, or the representative of one of several plaintiffs or defendants, wherever the cause of action survives. (*Revised Statutes of Mo.* of 1889, Sec. 2196.)

Gamble v. Daugherty, 71 Mo., 599.

Section 955 above referred to provides that where a plaintiff or defendant dies, the action shall not abate, as at common law, if the right of action survives, but may be proceeded with in favor of or against representatives of the deceased. Evidently having before him the idea that cases might arise where there was *more than one plaintiff or more than one defendant*, and that one party on either side might die, in which event, at common law, the entire action abated, the framer of the act further provided by Section 956, that where one of several plaintiffs or where one of several defendants dies, the action shall not thereby abate, but may be continued in favor of the surviving plaintiffs or against the surviving defendants.

It was claimed by plaintiff in error that under the latter section an action *necessarily* abates as to a dying defendant.

We respectfully submit that taking the two sections together, it is apparent that the purpose of the act was simply to prevent the abatement of the entire action where there are several defendants and one dies, and his legal representatives either decline to come in and be substituted, or where they are, as in the case at bar, beyond the jurisdiction of the court, and cannot be brought in involuntarily.

But, however this may be, the objection not having been made in the trial court, plaintiff in error cannot ask for its consideration.

No authorities need be cited in support of the proposition that a point cannot be pressed for the first time upon the attention of the Appellate Court.

The case of *Insurance Company v. Lewis*, 97 U. S., 682, which was relied upon by plaintiff in error, was a case, where Lewis, as administrator, was plaintiff, endeavoring to enforce by suit a life insurance policy issued by the defendant. As will appear from the opinion in that case, it was *admitted* that the deceased left no property in Missouri, and that Lewis took charge of the administration "*for the sole purpose of collecting the policy in suit.*" Upon the defense that the plaintiff had *no cause of action* it was held by this court that under these admissions judgment could not be sustained in favor of the administrator.

In the case of *New England Life Insurance Company v. Woodworth*, 111 U. S., 138, the action by an administrator on a policy of insurance was upheld, though the place of administration was not the

place of the deceased's residence. The question in that case was also raised on the defendant's appeal, that the plaintiff, as such administrator, had no cause of action.

In the case at bar, De La Vergne's representative did not sue out a writ. Even though he might have raised the question, or even if De La Vergne's New York executors might have appeared specially to raise this objection, we respectfully submit it cannot be raised by the De La Vergne Company.

How is it injured or affected adversely by the action of the lower court in permitting the revivor, or in entering judgment as well against the assets of De La Vergne in Missouri as against the De La Vergne Company?

Counsel recognized the weakness of their position, for they said that it might be claimed that such action was not available error in behalf of the De La Vergne Company. They sought to answer this objection, which naturally occurred to them, by claiming that if the contract sought to be enforced was entered into by De La Vergne *without any authority* from the stockholders or the directors of the company, that there would be a liability, either on the part of De La Vergne or his estate, to the corporation for any injury resulting therefrom, and that therefore "The De La Vergne Company is justifiedly interested in having a judgment, if any can be recovered in such form, that it has validity against De La Vergne's estate."

We submit that if the contract was entered into by the deceased party *without authority* (the trial court

expressly found that he acted pursuant to authority, and the agreed statement admits as much), that there never would have been a judgment rendered against the plaintiff in error. Or if the contention be true that De La Vergne acted without authority, the company may still pursue its claim against his estate in New York, Missouri, or elsewhere. So that in no view of the case can it be said that the De La Vergne Company is injured or prejudiced by the judgment against the goods and chattels of De La Vergne in the hands of the Missouri executor. If this judgment is good, then clearly the De La Vergne Company is benefited to that extent. If the judgment is void, as claimed, the De La Vergne Company is in no worse position than if the court below had sustained its motion to dismiss this suit as against the De La Vergne estate. Had the motion been sustained, clearly the suit would have been proceeded with against the De La Vergne Company alone, upon the theory of its counsel, and judgment would have followed against it as a sole defendant.

The claim was also made that inasmuch as the only property which Mr. De La Vergne owned in Missouri, at the time of his death, consisted of stock in a New York corporation, that this was not such property as could be made the subject of administration in St. Louis; this, on the theory that the *situs* of the stock was the home of the corporation issuing it. In support of this contention were cited the cases of *Armour Bros. Packing Co. v. St. Louis National Bank*, 113 Mo., 12, and *Young v. Iron Co.*, 2 S. W. Rep., 202. In each of these cases the

question was whether stock in a foreign corporation could be reached by *levy of an execution* on the mere certificates. It was very properly held that corporate stock could not be so reached by process. But this, we submit, does not in any way determine that the certificate cannot be taken into the custody of an administrator, and either sold or distributed to the proper parties in course of administration. On the contrary, it has been held, as we have already shown, that the assignee of stock from a foreign executor or administrator may compel the transfer thereof in the courts of the State where the corporation is located or does business.

Middlebrook v. Merchants' Bank, 3 Abb. App. Dec., 295; s. c., 41 Barb, 481.
Luce v. Railroad, 63 N. H., 588.
Brown v. Gas Light Co., 58 Cal., 426.

The mere fact that the *situs* of the stock was with the corporation in New York, and that it could not be seized under execution or levied upon, by garnishment or otherwise, except in that State, did not prevent the title from vesting in a Missouri administrator. As well might it be insisted that the title to a claim of a decedent in Missouri against a debtor residing in New York City would not vest in a Missouri administrator; for the *situs* of the debt in such case is in New York, where the debtor resides.

In the case last supposed, if the debt was evidenced by a written acknowledgment, it could not be levied upon or seized by the manual taking on the part of the officer of the paper itself; yet, no one will suppose that in case of the death of the holder thereof,

the title to the claim would not pass to his legal representative.

If Richardson, the administrator, had been directed by the proper court in which administration was proceeding, to sell the De La Vergne stock to pay debts, the purchaser taking title from him could have compelled the transfer of the stock in New York; or, if the stock were not required for the payment of debts. at the close of administration the distributee from the administrator, could compel such transfer.

Shares of stock in a corporation are deemed personal property. Says *Redfield on Wills*:

"Some of the early English cases treated shares of stock in joint incorporated companies as real estate, on account of the profits arising or accruing out of the realty; but the settled rule, both in England and in America, is that the shares in all corporations, or what is commonly denominated corporate stock, are mere personalty."

3 Redfield on Wills, Star page 182.

Being personalty, the stock therefore passes to the legal representative of the deceased at such place or places where the stock may be at the time of his death.

The point in question is not whether the Missouri administrator could maintain an action in his representative capacity in New York, or whether the stock could have been *levied* on in Missouri, but whether his assignee of this stock could maintain title thereto in the domicile of the corporation.

This precise question is discussed by Judge Story in the case of *Trecothick v. Austin*, 4 Mason's C. C. Rep., 16, in which he says:

"Whenever the title to a thing passes by the *lex loci*, that title may, nay, must be, made out by such law, and that is all that is necessary. The reason why an administrator cannot sue in his own name for property here, is that the administration is local and confers such right only as to the property within the jurisdiction. It is a limited right of representation of the deceased. But suppose a foreign administrator sells goods of the deceased in a foreign country, and they are brought here and the right to them is here contested in a suit, may not the party assert his title to them under the foreign sale and administration, without a probate here? *A will bequeathing personal estate conveys that property wherever it may be situated*, if the will is made according to the laws of the place of the testator's domicile. And it has never been supposed that it was indispensable to the assertion of a title derived under such will, that there should be a probate in every place where such property was situated.

To the same effect are the cases of *Middlebrook v. Merchants' Bank*, 41 Barb., 481, and *Luce v. Railroad Co.*, 63 N. H., 588, already referred to.

We therefore submit that the shares of stock of De La Vergne in the hands of Mr. Busch in St. Louis, at the time of his decease, were assets properly administered upon in Missouri. And this is the only question which was raised by the De La Vergne

Company in the trial court although it is difficult to conceive how that question could concern *it*.

But recurring again for a moment to the question of the right to revive an action under the federal statute, where one of several parties on either side of a case dies, we call to the court's attention the case of *Martin's admr. v. B. & O. R. Co.*, 151 U. S., 673, and *Moses v. Wooster*, 115 U. S., 285, which appear to recognize that right. In the latter case the court says:

"Undoubtedly cases may arise in which the presence of the representatives of a deceased appellant will be required for the due prosecution of an appeal, *notwithstanding the survivorship of others.* * * * Here, however, there is no need of a revivor that substantial justice may be done. The decree below was against all the defendants jointly, upon a joint cause of action. It affected all alike, and the interest of the decedent is in no way separate or distinct from the others. *If the representatives of a decedent appellant voluntarily come in and ask to be made parties, they may be admitted.* In the present case the representatives of the decedent, although notified, do not appear."

From which it would appear that it is not improper to revive an action against the representatives of a dying party, although other parties are left on the same side of the case.

That counsel were themselves of opinion in the lower court that the action was properly revivable against De La Vergne's representatives, but merely claimed that it was not competent to revive against

the Missouri administrator, is apparent from their suggestion then made that plaintiffs should have brought in the New York executors, in order to obtain what they termed a valid judgment against De La Vergne's estate for the benefit of the De La Vergne Company, if De La Vergne had exceeded his authority in the making of the contract.

It has been repeatedly held that *no judgment shall be reversed in a court of error when it is clear that the error did not prejudice and could not have prejudiced the rights of the party against whom the ruling was made.*"

Smith v. Shoemaker, 17 Wall., 630.
Decatur Bank v. St. Louis Bank, 21 Wall., 294.
Ogdensberg v. Railroad, 22 Wall., 123.
Lancaster v. Collins, 115 U. S., 222.

Therefore, since under no view of this objection, whether the court below was right or erred, the De La Vergne Company was prejudiced or injured, should the cause be reversed.

XVII.

Lastly it was urged, and will be again urged by counsel for the De La Vergne Co., that defendants received nothing of value from plaintiffs, and that plaintiffs are seeking to recover a judgment from them upon a mere barren and technical contract. After what we have said in the course of this argument we feel that such contention need scarcely be further answered, but we cannot refrain from again recalling to the court that the defendants

obtained all the advantages and the benefits of the contract, so far as they made effort to acquire them. And so two courts have determined after painstaking and deliberate investigation.

Defendants understood perfectly that plaintiffs were not themselves to make actual delivery to them of the tangible assets of the Consolidated Company, but that they were to work out their right of possession for themselves and in their own way. The sale was subject to the rights of the Consolidated Company's creditors, and this was so plainly announced by the language of the contract that it is idle for defendants to insist that because they did not get these assets, *free from this burden*, that therefore they received nothing and should pay nothing.

Even though these tangible assets, subject to the rights of the assignee, as the representative of the Consolidated Company's creditors, had been the only thing for which defendants agreed to pay the amount nominated in the contract, and even though they had never received a single article from the hands of the assignee, that would constitute no defense to these actions, if in fact they acquired all that plaintiffs professed to sell; which was the right to secure these assets from the assignee by an appropriate arrangement with creditors. The failure of defendants to exercise that right cannot deprive plaintiffs of the consideration agreed to be paid therefor.

Nor would it avail defendants if they satisfied the court that they had ventured into an unprofitable bargain. They were *sui juris* and what they did

was done after the most careful and businesslike investigation.

But the bargain was not an unprofitable one. The only difficulty, and that is the difficulty which has given rise to this litigation, is that defendants sought to make it still more profitable by evading their obligation to plaintiffs. They have endeavored, as the record discloses, to secure by stealth and under cover, without remuneration to plaintiffs, that which they bargained for and for which they agreed to pay.

They did secure the good-will of the Consolidated Co.; they secured its trade, they secured the covenants of the plaintiffs and they secured legal control over the Consolidated Company's corporate rights by obtaining and retaining the custody of the certificates of stock, all assigned to De La Vergne. These were evidently all of the benefits for which they particularly cared, and having procured them they were willing to forego the possession of the ordinary personal chattels.

Had their repudiation been promptly made, and made before they had secured the substantial benefits of the contract, plaintiffs might have, and could have, found other willing purchasers. But the conduct of defendants prevented this. Plaintiffs had not even in September the evidence of title to their own property.

And having, upon one pretext or another, avoided an open avowal of their position until satisfied that plaintiffs were no longer in position to reorganize

their corporation, or to negotiate with others for a sale of their equity in the assets thereof, and satisfied that they had extracted from those assets the greater value thereof, they have sought, upon every technicality, to evade that compensation which they solemnly promised to make. And they have succeeded for eight long years.

We have thus attempted, at the hazard of being tedious, to anticipate the arguments which were made on behalf of defendants in the courts below. We have no doubt that since the announcement of the judgment of the Court of Appeals counsel will have discovered further technical objections which will be urged upon this court. But confident that none can be advanced with sufficient merit to induce this court to set aside the deliberate judgment of two courts, we submit this cause.

J. M. WILSON,

LEO RASSIEUR,

ELENEIOUS SMITH,

Attorneys for Defendants in Error.

St. Louis, Mo., March 9th, 1899.